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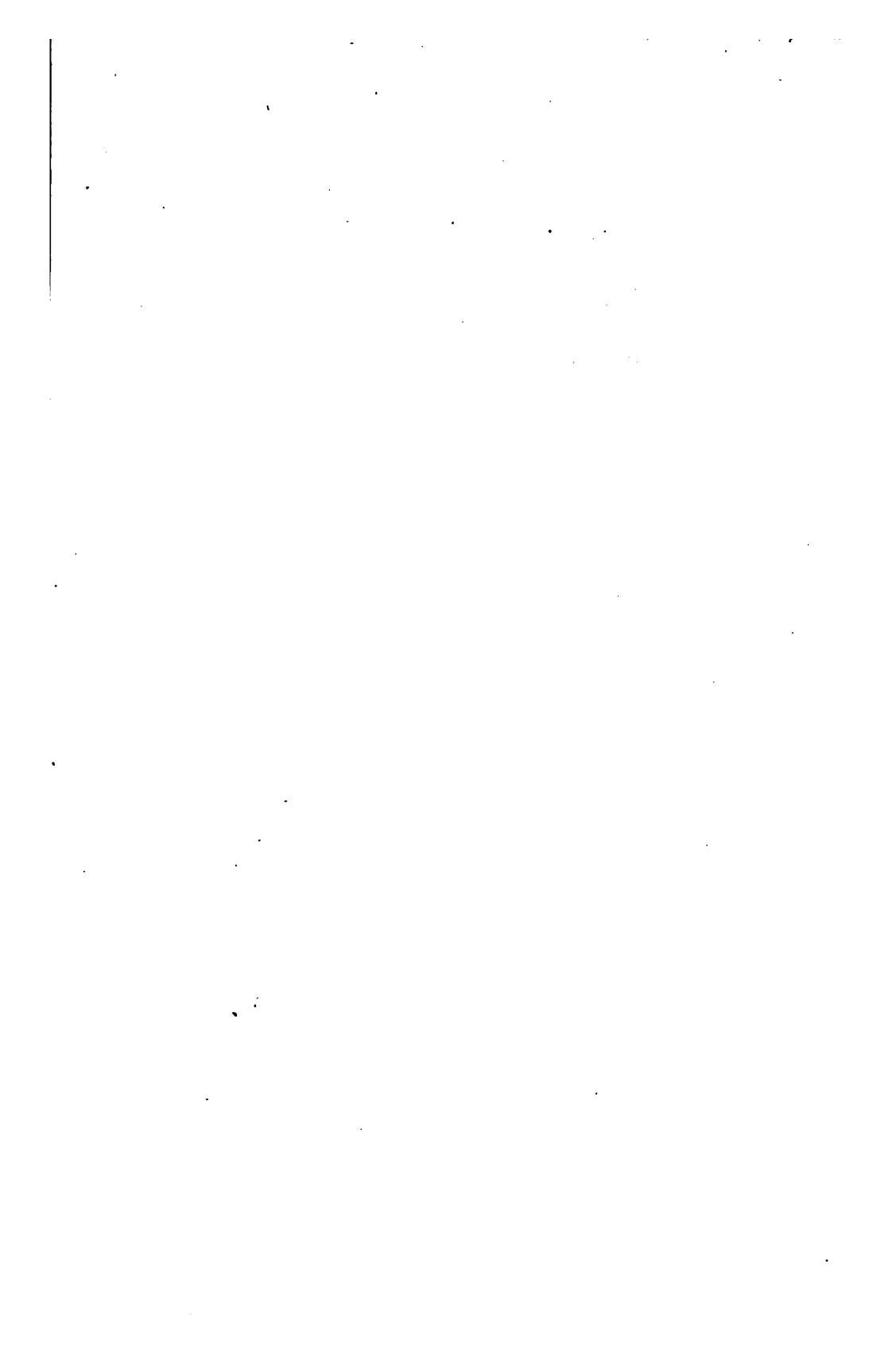
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THESE Lectures are in continuation of the Lectures on the Seisin of the Freehold already published. In a few cases, particularly with regard to the Settled Estates Act, 1877, the text has been adapted to the altered state of the law. The Author has been assisted in preparing these Lectures for the press by his son Mr. T. CYPRIAN WILLIAMS, of Lincoln's Inn, barrister-at-law.

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36, note (*d*), for Stat. 38 Hen. VIII. c. 1, read—Stat. 32 Hen. VIII. c. 1.

309, last line but one, for *Yellowley v. Gower*, read—*Yellowly v. Gower*, also in marginal note same page, also at p. 312, line 8, and in marginal notes same page.

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SETTLEMENTS.

LECTURE I.

THE subject of the present course of Lectures is the *Settlement of Real Estates*.

The law relating to the settlement of real estates is a very important branch of the Law of Real Property. Settlements, as now made, depend for their effect entirely upon the Statute of Uses (*a*). In a former Lecture I stated at length the first and most important section of this statute (*b*). It enacts shortly that where any person is seised of lands to the use, confidence or trust of any other person, or of any body politic, by any means whatsoever, then the persons and bodies politic that have the use, confidence or trust, shall be deemed and adjudged in lawful seisin, estate and possession, of and in the same lands, to all intents, of such estates as they had in the use, trust or confidence. And the section then goes on to provide, that the estate, title, right and possession that were in the person seised of the lands to the use, confidence or trust of such persons, or any body politic, shall be thenceforth deemed to be in them that have or shall have such use, confidence or trust, after such manner, form and condition as they had before in the use, confidence or trust.

Statute of
Uses.
Sect. 1.

In a former Lecture I explained the use that was made of this statute in the ordinary mode of conveyance

Lease and re-
lease.

(*a*) Stat. 27 Hen. VIII. c. 10.

(*b*) Lectures on the Seisin of
the Freehold, pp. 137—140.

by lease and release, which for many years prevailed in this country (c). A bargain and sale for a year made the vendor a trustee of the lands so bargained and sold for the vendee, for the term of one year; and the statute thereupon put the vendee in actual possession, for the term of one year, and so enabled him to receive a release of the inheritance. For a release of the inheritance could only be made, by the common law, to a person who was in actual possession of the land released.

As this Statute of Uses is the foundation of the whole system of modern conveyancing, and particularly of that part which relates to settlements, it is of the utmost importance that you should have a clear idea of the effect and operation of this statute. I propose, therefore to devote the present and next four Lectures to a further explanation of its meaning and effect.

Corporation. The statute, you will see, speaks only of *persons* seised to any use, confidence or trust. Now a corporation or body politic is not a person; it follows, therefore, that a corporation cannot stand seised to a use, within the meaning of this statute (d):—that is to say, that if lands are given to a corporation, to the use of or upon trust or confidence for A., his heirs and assigns, the statute will not execute or act upon the use, confidence or trust so declared; but the corporation will still be seised of the legal estate and will hold it upon an equitable trust for A. in fee. If the statute had executed the use, confidence or trust, then the legal estate would have been taken out of the corporation, and vested in A. in fee. A fine distinction was, however, taken in an old case (e), that although a corporation could not take

(c) Lectures on the Seisin of the Freehold, pp. 145—147.

(e) *Sir Thomas Holland and Bonis' case*, 3 Leo. 175; Sugden's

(d) Sugden's note to Gilbert on Uses, p. 8.

note to Gilbert on Uses, p. 9.

an estate to another's use, they might charge their own possessions with a use to another, and therefore could convey by bargain and sale. But this refinement was not followed in practice (*f*). It was generally considered that a corporation could not convey lands by lease and release; and that the bargain and sale by the corporation for one year would not be executed or turned into a legal estate in possession for one year, by the Statute of Uses; but would give only an equitable estate for that period. So that the bargainee would not thereby get a sufficient actual possession to enable him to receive a release of the inheritance. But you will observe that the words "bodies politic" are used in that part of the statute which relates to those who *have* the use, confidence or trust. It says that where any person is seised of land, to the use, confidence or trust of any other person, *or of any body politic*, then the person *and bodies politic* that have any such use, confidence or trust, shall be deemed in lawful seisin, estate and possession. It follows from this, that if land be conveyed to A. and his heirs, to the use of a corporation, the statute executes or acts upon this use, and the seisin of A. is instantaneous merely; for the moment he obtains seisin, it is the same moment taken away from him by the operation of the statute, and vested in the corporation. The legal estate in fee simple by this means becomes vested in the corporation, as effectually as if it had been directly conveyed to the corporation by feoffment, fine or otherwise. The same result would of course follow if lands were conveyed to A. and his heirs *in trust* for the corporation. Whether the word used be *use*, or whether it be *trust*, the effect is the same (*g*). In either case, when the statute executes the use or trust, he that has the use or trust has the legal

Corporation
could not
convey by
lease and re-
lease.

(*f*) 2 Prest. Conv. 255.

(*g*) *Doe d. Terry v. Collier*, 11 East, 377.

seisin, estate and possession immediately vested in him by the operation of the statute.

Other persons.

Orme's case.

Again, the statute says, that where any person stands seised of lands to the use, confidence or trust of any other person or persons. If therefore a feoffment be made to A. and his heirs, to the use of A. and his heirs, this use is not executed by the statute, but the feoffee is in by the common law (*h*). This is a point of law which occasioned much discussion in a recent case before the Court of Common Pleas. The case to which I refer is *Orme's case* (*i*). The case was this. On the 13th of October, 1871, William Orme, being seised in fee of certain lands, granted to three persons, Orme, Lawton and Kerfoot, and their heirs, a perpetual rent-charge of 9*l.*, payable half-yearly on the 5th of April and the 5th of October in each year, the first payment to be made on the 5th of April, 1872, to hold the said rent-charge unto the said Orme, Lawton and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton and Kerfoot, their heirs and assigns for ever, as tenants in common and in equal shares. The first half-yearly payment was made on the 5th of April, 1872. Now the Reform Act (*k*) provides that no person shall be registered in any year in respect of his estate and interest in any lands and tenements as a freeholder, unless he shall have been in the *actual possession* thereof for six calendar months at least next previous to the last day of July in such year. The question was whether the grantees had been in actual possession of their rent-charges for six calendar months at least previous to the last day of July, 1872. The first half-yearly payment was not made to them until the 5th of April, 1872. If therefore they were in by the common law, they had not been in actual posses-

(*h*) *Doe d. Lloyd v. Passingham*,
6 B. & C. 305.

(*i*) L. R., 8 C. P. 281.

(*k*) Stat. 2 Will. IV. c. 45, s. 26.

sion of the rent-charge for six calendar months, and so were not entitled to be registered in that year as voters for the county (*l*); but if they were in by the Statute of Uses, which gives actual possession, then, according to a case which I shall presently refer to, they would have been, by virtue of that statute, in actual possession of the rent-charge for more than six months, viz., from the 13th of October, 1871, the date of the deed by which the rent-charges were granted to them. The court held that the grantees were in by the common law, that they had not had actual possession of their rent-charges for six calendar months previous to the last day of July, 1872, and that therefore they were not entitled to be registered as county voters for that year.

In *Orme's case* the grant was to the three grantees and their heirs, to hold unto the three grantees, their heirs and assigns, to the use of the three grantees, their heirs and assigns for ever, as tenants in common and in equal shares. The words "as tenants in common" in this sentence may fairly be considered applicable, not exclusively to the use declared, but also to the habendum to the three grantees, their heirs and assigns. And, in this view of the case, the grant was in substance a grant to the three, their heirs and assigns, as tenants in common in equal shares, to the use of the three, their heirs and assigns, as tenants in common in equal shares. The use was simply commensurate with the legal estate; and so the grantees were in by the common law. But a very slight alteration of the wording would, I apprehend, have brought the case within the operation of the second section of the Statute of Uses, which contains an exception to the rule that the use must, in order to operate, be limited to some other person than the grantee. This

Remarks on
Orme's case.

The second
section of the
Statute of
Uses.

(*l*) *Murray v. Thorniley*, 2 C. B. 217; *Hayden v. Tiverton*, 4 C. B. 1.

section enacts shortly, that where any persons are jointly seised to the use, confidence or trust of any of themselves, the persons that have any such use, confidence or trust, shall be deemed and adjudged to have, only to them that have any such use, confidence or trust, such estate, possession and seisin of and in the lands in like manner, form, condition and course as they had before in the use, confidence or trust. So that, in the present case, if the grant had been made to hold to the three grantees and their heirs jointly, as to one third, to the use of the first grantee, his heirs and assigns, as to another third, to the use of the second grantee, his heirs and assigns, and as to the remaining third to the use of the third grantee, his heirs and assigns, the case would have fallen within the very terms of the second section of the statute, and each grantee would have been in, not by the common law, but under this section of the Statute of Uses. So I apprehend if the grant had been to hold to the three grantees, their heirs and assigns *jointly* [the word *jointly* being inserted], to the use of the three grantees, their heirs and assigns, as tenants in common in equal shares, the case would equally have fallen within the second section of the statute, for all three would have stood seised of one third part to the use of one of themselves, his heirs and assigns; and he only would, therefore, be deemed and adjudged to have such estate in that third part as he had in the use thereof, and so would be in under the statute.

If the feoffee takes only a portion of the use.

Again, if the feoffee takes only a portion of the use, confidence or trust, and the remaining portion thereof is given to some other person, then the statute will execute the use, confidence or trust thus limited. For instance, if a feoffment is made to A. and his heirs, to the use of A. and the heirs of his body, and, on failure of such issue, to the use of B., his heirs and assigns for ever, here the statute will execute the uses limited. The

seisin in fee which was given to A. by the feoffment, is taken away by the statute, and vested in himself and the heirs of his body, thereby creating in him a legal estate in tail. The statute also executes the remainder over to B. and his heirs, giving to him a legal estate in fee simple, in remainder expectant on the determination of the estate tail of A.

So, if a feoffment be made to A. and his heirs, to the use of B. for life, with remainder to the use of A. for life, with remainder to the use of C. in fee. In this case the statute will execute the uses, not only to B. and C., but also of necessity the use to A. himself, turning it into a legal estate to himself for life, in remainder expectant on the decease of B.

Use to the feoffee for his life.

The statute enacts that, when any person or persons stand or be seised of lands to a use, confidence or trust, they who have the use, confidence or trust shall have the possession. It follows, therefore, that, in order that a use, confidence or trust shall be executed by the statute, there must be some person seised to the use. If, therefore, lands be granted or conveyed to A. for his life only, to the use of B., his heirs and assigns, B. cannot take any larger estate than during the life of A. A. had an estate given to him for his own life, and this estate is, by virtue of the use or trust engrafted on it, handed over or conveyed to B.; and it cannot be conveyed to him for any longer period than the estate lasts. On the death of A., therefore, B.'s estate will come to an end. If, however, the grant should be made to A. for his life, to the use of A., his heirs and assigns, here the Statute of Uses can have no operation, and the courts, in furtherance of the intention, will hold that this is merely a clumsy way of giving A. an estate in fee simple at the common law (*m*).

There must be some person seised to the use.

(*m*) *Jenkins v. Young*, Cro. Car. 230.

Operation of
Statute of
Uses.

The necessity that there should be a person seised of the lands to the uses mentioned, in order that such uses should be turned by the statute into legal estates, has given rise to a great deal of controversy as to the exact operation of the statute in many cases. Suppose lands be conveyed to A. and his heirs, to the use of B. for life, and, after the decease of B., to some contingent use, as to the use of C., his heirs and assigns, in case C. shall be living at the decease of B. This is a contingent remainder to C. in fee. It is not a vested remainder; because, if the estate to B. were to fail at any time during the life of B., there is no capacity in C.'s estate to come thenceforth into immediate possession (*n*). C. can take nothing, unless he is alive at B.'s death; and, whether he will be alive or not is a contingency, which cannot be determined whilst they are both living. Now it was formerly considered necessary that, in case of contingent or future uses, there should, *at the time* of such contingent and future uses taking effect, be some person seised to the use of the person who is to take in contingency. And for many years a somewhat strange and artificial construction of the statute was resorted to, in order to explain its effect in turning into a legal estate a use or trust which is not to take effect till a future time. Take the case I have just referred to. The conveyance is made to A. and his heirs. This, by the common law, vests in him an estate in fee simple; but it is made to the use of B. for his life. The Statute of Uses takes away the seisin from A., and vests it in B. during his life; and B. becomes actual tenant for life, in the same manner as if the lands had been conveyed directly to him for his life. B. then dies during the life of C. It was said that there must be some person seised to the use of another person, in order that the statute should have operation. Who is

(*n*) Lectures on the Seisin of the Freehold, p. 189.

the person that is to be seised to the use of C. and his heirs? It was said that the whole seisin of A., the feoffee, was taken away from him by virtue of the statute, when it was vested in B. for his life; and, having been taken from him, it cannot remain in him; and, if A. is not seised to the use of C., how can C. get the legal estate by virtue of the Statute of Uses? In order to get over this difficulty, the doctrine, which is known by the name of the doctrine of *scintilla juris*, *Scintilla juris*. was generally adopted by real property lawyers. It was said that, although A.'s seisin was taken away from him by the statute, and vested in B. during his life, yet that, upon the ending of the use limited to B., the original seisin of A. reverted to him, for the purpose of serving the secondary use to C.; so that, during the life of B., although A.'s seisin was taken from him, yet there remained vested in him the possibility of seisin, or a *scintilla juris*, a spark of right which, to continue the metaphor, burnt up into a flame on the death of B. and was consumed, by the statute, in the use limited to C.; which use had been before contingent, but now became a vested estate. The effect of this doctrine was in one case very serious, namely, in case A. should die without heirs during the life of B., so that A.'s estate in fee simple should come to an end before the contingency arose, on which the use to C. was to take effect. In this case the use to C. and his heirs would fail for want of a person seised to this use. Mr. Fearne, in his Treatise on Contingent Remainders, raised doubts as to the necessity of any such doctrine. He thought it better to consider the operation of the statute as instantaneous on the execution of the conveyance, turning vested uses into vested estates, and contingent or future uses into contingent or future estates, instead of its operating from time to time, as each contingent or future use came into possession (o). And Mr. Fearne's

Mr. Fearne's
view.

(o) Fearne on Contingent Remainders, pp. 300, 301.

view was afterwards adopted by Lord St. Leonards in his Treatise on Powers (*p*).

The view taken by these learned persons has since been adopted by the legislature. The Act to further amend the Law of Property (*q*) enacts (*r*) as follows:—
 “Where, by any instrument, any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect, when and as they arise, by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses, or *scintilla juris*, shall not be deemed necessary, for the support of, or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.”

Effect of this enactment.

The effect of this enactment is, that if a feoffment be made to A. and his heirs, to uses, some of which are contingent or future, it is not necessary that, at the time when the contingency happens, or the future use becomes a use in possession, there should be any seisin in A. or his heirs, to be executed by the Statute of Uses, and to be turned into a legal estate, corresponding to the use which has thus become a use in possession. The whole operation of the Statute of Uses is, by this enactment, construed to take effect instantaneously. The moment the feoffment is made to A. and his heirs, his estate is, by the statute, cut up into as many uses as are limited; such uses as are limited in possession being turned into

(*p*) Sugden on Powers, pp. 18
 —20, 8th ed.

(*q*) Stat. 23 & 24 Vict. c. 38.
 (*r*) Sect. 7.

estates in possession; such uses as are limited in remainder being turned into estates in remainder; and such uses as are limited in contingency or futurity being turned into contingent remainders or future estates, exactly corresponding to the uses limited by the feoffment. The Statute of Uses is thus made to operate once for all, instead of, as it were, running along with the limitations, and operating from time to time, as each successive limitation of a use requires to be turned into a legal estate. The danger arising from the decease of the feoffee to uses without leaving any heirs is also obviated. The contingent uses are, by the Statute of Uses, turned into corresponding contingent estates at the very moment that the feoffment is executed; and there is no necessity that any spark of right or possibility of seisin should remain in the feoffee or his heirs, or in any one else, to give effect to the contingent uses as they arise.

There is another point, however, of a somewhat similar nature, which has recently given a great deal of trouble to the courts. The statute says in the first section that where any person is seised of lands or hereditaments to the use of another, he that has the use shall be deemed in lawful seisin, estate and possession. It also further enacts in the same section that the estate, title, right and possession, that was in such person seised to the use, shall thenceforth be in him that has the use. If, therefore, a rent-charge be granted to A. and his heirs, to the use of B. and his heirs, what is the effect of the Statute of Uses upon this grant? Now it is clear that, at the common law, the moment the grant is made, A. is *seised in law* of the rent-charge, but he has not *actual seisin* of the rent-charge until some part of the rent secured is received by him. We have seen that if a rent-charge be granted to A. and his heirs, to the use of A. and his heirs, the Statute of Uses has no opera-

tion (s). A. is seised in law of the rent-charge the moment the grant is made to him; but he is not in actual possession of it until he has received some part of it. Now the statute says that when any person is *seised* to the use of another, he that has the use shall be adjudged in lawful possession. Does the seisin to the use of another referred to by the statute mean an *actual seisin*, or is a *seisin in law* sufficient? So that, if A. is seised in law of any hereditament to the use of B., B. should be put by the statute in actual seisin or possession? It has been argued that the latter part of the first section of the statute must be regarded as controlling the former part, and that, inasmuch as the estate, title, right and possession that was in the person seised to the use is transferred to him that has the use, he that has the use can have no greater estate, right, title or possession than was vested in the grantee to uses. And if this argument be correct, it follows that, if a rent-charge be granted to A. and his heirs, to the use of B. and his heirs, as A. before the receipt of the rent-charge is merely seised in law, so B., to whom his seisin is transferred, can himself be seised only in law, and cannot be put by the statute in actual seisin and possession. This no doubt is a fair argument; but the courts have held otherwise, and I think rightly. There is no reason that I can see why the latter part of the first section should be held to control the former one. All that the former part of the section requires is a person seised to the use. A person who is seised in law is undoubtedly seised; and if the statute is competent to take away from one, to whom actual seisin has been delivered, that actual seisin, though formally given to him, and to vest it in the person to whose use he is enfeoffed, surely it is competent for the statute to turn

(s) *Ante*, pp. 4, 5.

the seisin in law of the grantee to uses, into the actual possession of the person to whose use the hereditament is granted. The words of the statute seem to me sufficient for the purpose, so long as there is a person seised, whether in deed or in law only. He that has the use is to have such like estate in the land or rent as he had in the use, and he is also to be adjudged in lawful possession of the land or rent, to all intents, constructions and purposes in the law. It seems to me that, both according to the words and the spirit of the statute, it is right to hold that if a rent-charge be granted to A. and his heirs, to the use of B. and his heirs, B. is instantaneously put, by the Statute of Uses, in actual possession of the rent-charge; although if the grant had been made to him directly, independently of the statute, he would not have been in actual possession until he had actually received a part of the rent. It seems to me that the doctrine of *scintilla juris*, which in former days was firmly believed in, completely covers the whole point at issue; for, if that doctrine were true, a mere spark of right, developed into a seisin, was held sufficient to serve the uses. And the seisin, into which this spark of right was developed, was not necessarily an *actual seisin*, otherwise no contingent use could have arisen until the feoffee to uses again actually entered into the lands, of which he was to be seised to some future or contingent use. But no such entry was deemed necessary if the particular estate continued undivested to the end. It is true that, if the tenant for life was disseised, an actual entry either by him or by the feoffee to uses was at one time thought necessary, in order that future or contingent uses might take effect as actual estates; but if there were no such disseisin, the *scintilla juris* remaining in the feoffee was always deemed sufficient to serve the contingent uses as they arose, or in other words to turn them into correspond-

ing estates in possession by virtue of the Statute of Uses (*t*).

*Heelis v.
Blain.*

The question which I have discussed came before the Court of Common Pleas in the year 1864 in the case of *Heelis v. Blain* (*u*). It was, like *Orme's case* to which I have just referred (*x*), a registration case as to the right of voting for the county under the Reform Act. Stephen Heelis, being seised of a perpetual rent-charge of 50*l.*, by indenture dated the 27th of January, 1864, granted the said rent of 50*l.* to John Heelis and his heirs, to the use of Stephen, John, Thomas, Arthur, James and Edward Heelis respectively and their respective heirs and assigns equally in undivided sixth shares as tenants in common. The first half-year's rent, which became due after the execution of the deed of 27th January, 1864, became due on the 24th of June in that year; and it was paid on the 8th of July following to John Heelis on behalf of himself and the five other parties entitled thereto under the deed; and he paid over their respective shares to them at various times between the 8th and 30th of July. No portion of the rent-charge was paid after the execution of the deed of the 27th January, 1864, until the 24th of June in the same year. Arthur Heelis claimed a vote in respect of his share in the rent-charge; and it was objected that he had not been in actual possession for six calendar months next previous to the last day of July, 1864; in which case he would not have been entitled to be registered in the list of voters for that year. And so it was held by the revising barrister, who erased his name from the list of voters. But on appeal his decision was reversed; and it was held that the Statute of Uses gave Arthur Heelis actual posses-

(*t*) *Fearne on Contingent Remainders*, 290.

(*u*) 18 C. B., N. S. 90.

(*x*) *Ante*, pp. 4, 5.

sion of his share of the rent-charge, from the time when the deed of grant of the 27th January, 1864, was executed; so that he had been, for six months prior to the last day of July, 1864, in actual possession of his rent-charge within the meaning of the statute. Soon after this decision was published, it was pronounced by a writer in a legal periodical to be clearly wrong (*y*); and this confident opinion appears to have had some effect upon the profession; for the matter was again severely contested in a case of the same kind which came before the Court of Common Pleas in the year 1872. This was *Hadfield's case* which is reported in the Law Reports, 8 Common Pleas (*z*). The case was precisely of the same description as that in *Heelis v. Blain*. A rent-charge was granted to certain persons and their heirs, to the use of certain other persons, their heirs and assigns, as tenants in common; and the court, after lengthened arguments and with some expressions of doubt, adhered to the decision of their predecessors in the case of *Heelis v. Blain* (*a*). *Hadfield's case.*

It seems to me that the doubtful point in both these cases was, not so much as to the operation of the Statute of Uses in giving actual possession, but whether the

(*y*) The Jurist, 28th January, 1865.

(*z*) Page 306.

(*a*) If a fine were levied of a reversion independently of the Statute of Uses, the conusee could not distrain on the lands for the rent belonging to the reversion, until the tenant had attorned to him. (Litt., sect. 579.) But if a fine were levied of a reversion to A. and his heirs, to the use of B. and his heirs, then it was held that as the Statute of Uses executed the possession to the use,

B. was immediately in possession without any attornment, and could distrain at once on the tenant for his rent. This is distinctly laid down by Lord Coke in Coke upon Littleton, 309 b; and it seems to me a strong authority that a seisin in law in a grantee to uses will be turned by the statute into an actual seisin of the cestui que use. See Booth on Real Actions, 250; Pigott on Recoveries, 49; 5 Cru. Dig. 94, par. 9; *Finch's case*, 6 Rep. 68 a.

actual possession intended by the Reform Act was satisfied by the actual possession which is given by the Statute of Uses. When a statute such as the Statute of Uses enacts that one man, who is plainly out of possession, shall to all intents and purposes be in actual possession, it is very difficult to say what sort of possession a man has, who practically has no possession at all. I think it might well have been held that this technical kind of possession was not such an actual possession as the Reform Act intended. The possession given by the Statute of Uses having, however, been twice actually decided to be sufficient, this is of course law; and, when one statute uses so very nearly the same words as another statute, the courts are certainly justified in holding that both statutes mean the same thing. But, with regard to the Statute of Uses, both these cases decided, and I humbly think rightly, that whether the grantee to uses has given to him an *actual seisin*, or whether he has given to him merely a *seisin in law*, in both cases the effect of the Statute of Uses is to put the person, to whose use he is seised, into actual possession of the lands for such estate as he has in the use.

LECTURE II.

I INTEND to devote the present Lecture to the further explanation of the Statute of Uses, 27 Henry VIII. Chap. 10. The statute speaks of persons being seised to the *use, confidence or trust* of any other person or persons. These words however are not absolutely necessary to be used. It has been held that a feoffment to A. and his heirs, to the *intent* that the wife of the feoffor should have the land for her life, created a use, which was executed by the statute, and gave the wife the legal estate in the lands for her life (a). The Statute of Uses.
Intent.

Again there may be not only an express use, confidence or trust, but the use may be implied, or, as it is said, may *result* for the benefit of the feoffor and his heirs. Before the Statute of Uses was passed, persons frequently made feoffments of lands to other persons and their heirs, to their own use (b)—thus making the feoffees merely trustees for the feoffor. If no use or trust was expressly declared, and if no consideration was given to the feoffor by the feoffees, it was considered that the feoffees were intended to hold in trust for the feoffor; and he accordingly became entitled in equity to an estate in fee simple in the lands. After the passing of the Statute of Uses, he that had the use had the legal estate vested in him by virtue of the statute. If then, after the statute, a feoffment or any other conveyance is made by A. to B. and his heirs, without any consideration, and without any declaration of use contained in the deed, the use is said to result to the feoffor or conveying party; Resulting use.
Feoffment without consideration.

(a) *Anon.*, 4 Leo. 2, pl. 3.

(b) Lectures on the Seisin of the Freehold, p. 134.

and the consequence is that such a feoffment or conveyance becomes absolutely inoperative. The use which results to the feoffor gives him the same estate as he had in the use, and that is an estate in fee simple. He was seised in fee simple before; after the feoffment he is seised in fee simple again; so that a deed of this kind simply comes to nothing. In the same way, if a *fine* (c) should have been levied of the lands by the owner, without declaring any uses of the fine, the use would result to himself and his heirs, and he would be in of the same estate as he had before. So, if a use is declared only of a portion of the estate, the use, as to the remaining portion of the estate, will result to the feoffor. Thus, if a feoffment or any other conveyance be made to A. and his heirs, to the use of B. for life, without any further declaration of use to take effect after the death of B., in this case the reversion expectant on the death of B. will be a *resulting use* to the feoffor; and the effect of the conveyance will be that B. will take an estate for life, with remainder to the feoffor and his heirs. If, however, any consideration be given, even a nominal consideration such as 5s., this serves as an implied declaration that the feoffee shall have the use which is not otherwise expressly disposed of. But the same rule does not hold where any part of the use is expressly limited to the feoffee, and the residue left undisposed of; for the express declaration in this case is presumptive proof that the feoffee shall not have the remainder of the use. "Therefore," says Mr. Sanders in his *Essay on Uses and Trusts* (d), "if an estate be granted, even for a valuable consideration, to feoffees and their heirs, to the use of them for their lives, it should seem that the remainder of the use will result to the grantor; for the extent of the express limitation is the measure of the consideration. But when, in a conveyance to a purchaser, the contract is recited

Fine without
declaration of
uses.

Use declared
only of a por-
tion of the
estate.

Considera-
tion.

(c) Lectures on the Seisin of the
Freehold, pp. 106—111.

(d) Pp. 104, 105, 4th ed.; 102,
103, 5th ed.

to be for the purchase of the absolute fee simple, the consideration extends to the entire use; so that I conceive," says Mr. Sanders, "there can in that case be no resulting use to the grantor or vendor. The payment of the consideration money divests him of any beneficial interest, which constituted the use before the statute; and if any part of the use were to remain unlimited, it would vest, as it should seem, in the purchaser."

The doctrine of resulting uses is of frequent application. If a conveyance be made of lands, on marriage, to trustees and their heirs, to the use of the husband and wife for their lives, and afterwards to the use of the children of the marriage, without any further use being declared, then if they should both die without any children, the use, being undisposed of, would result to the settlor and his heirs, and give him a legal estate in fee simple. The result would be the same as if he had simply granted the lands to the husband and wife, with remainder to the issue of the marriage, and had not conveyed them to the trustees of the settlement and their heirs to the uses of the settlement.

Resulting use
in a settle-
ment.

With regard to the estate and possession which the statute vests in the person who has the use, and who is called *cestui que use*, it was thought at one time that, although the statute transferred the estate of the feoffee to the person that had the use, it would not be effectual to transfer the title deeds, and that the right to the title deeds would remain in the feoffee to uses, although his seisin was only an instantaneous one, and was taken from him by the statute, and vested in the person to whose use he was seised. This, however, has since been otherwise decided; and the *cestui que use*, when he becomes seised of the lands by virtue of the statute, becomes also entitled to all the title deeds in virtue of

Cestui que use.

Title deeds.

such seisin. This was decided in an Irish case (e), and and is I believe now considered to be the law.

Trespass.

Repeal of
Statute of
Uses pro-
posed.

The actual possession given by the statute is, as we have seen, an actual possession for the purpose of conferring a vote within the meaning of the Reform Act. It has been held, however, that it is not a sufficient possession to enable the *cestui que use* to bring an action of trespass against a trespasser; for an action of trespass must be brought by a person who is in what I may call the *actual* actual possession, and not in the constructive actual possession given by the statute (f). I cannot refrain from adding that, in my opinion, it is much to be regretted that the Statute of Uses should still remain unrepealed. It raises questions of the purest technicality. It was the means no doubt, as we shall presently see, of enabling settlements to be made, which could not be made by the common law. But the common law may be altered by statute; and it strikes me that it would be a very great improvement in our law if, following the example of some of our colonies, we should repeal the Statute of Uses, and enable all those modifications of estates, which are now effected by means of the statute, to be effected without its aid.

This statute was the means of greatly modifying the law with respect to legal estates, by turning uses and trusts into legal estates, and into such like estates as the *cestui que use* had in the use. All estates, which, before the statute, were good in equity, became after the statute good estates in law. By this means the rigour of the common law with respect to estates was greatly and beneficially softened. At the common law there might be an estate for life, or in tail, with

(e) *Malone v. Minoughan*, 14 2 Fonbl. Eq. 12. But *Anon.*,
Irish Common Law Reports, 540. Cro. Eliz. 46, and Com. Dig. tit.
(f) Gilb. Uses, 185, Sudg. ed.; Uses (I.), are contra.

remainder over to some other person. So there might be an estate granted to a man *on condition* that, on a certain event, it should revert to the feoffor or grantor and his heirs. But at the common law it was impossible to give an estate to A. and his heirs, with a condition that, upon a certain event happening, the estate should go to B. and his heirs—B. being another person than the feoffor or grantor. But, before the statute was passed, a feoffment might have been made to feoffees and their heirs, to the use of or in trust for A. and his heirs until a certain event, and, after the happening of that event, then to the use of or in trust for B. and his heirs. A conveyance of this kind, therefore, made after the passing of the statute, creates uses or trusts, which the statute executes or turns into legal estates; and the consequence is, that, after the execution of such a conveyance, A. has a legal estate in fee simple, determinable on the happening of the event; and, on the happening of the event, his estate in fee simple ceases and becomes instantaneously vested in B. and his heirs, according to the limitation of the use or trust. This is called a conditional limitation. This mode of conveyance has been found very convenient; but certainly, if the legislature were to say so, it might be done just as well without the Statute of Uses as by its aid. A use of this kind is also called a *shifting* or *springing use*. One of the ordinary and every day occurrences in which this doctrine is brought to bear, is the case of a marriage settlement of freehold lands. The settlement is executed a day or two before the marriage. Suppose the lands settled be the lands of the husband, he now grants them to the trustees of the settlement and their heirs, to the use of himself, his heirs and assigns, until the solemnization of the intended marriage, and, after the solemnization thereof, to the use of himself for life, and then to the use of his wife, or otherwise as may be agreed on, with remainder to the use of the children of

Condition.

Conditional
limitation.Shifting or
springing
use.Marriage
settlement.

the marriage, and so forth. The effect of this settlement is that, by virtue of the Statute of Uses, the moment it is executed the husband has an estate in fee simple vested in him, determinable in the event of his marrying the lady intended. If, from any circumstance, the marriage should never take place, he still remains seised in fee; but when the marriage happens, however long it may be postponed, that moment, by virtue of the Statute of Uses, the use to him for his life takes effect as a legal estate in possession, and he becomes thenceforward seised of the lands as tenant for life. If, in the instance which I have just given, the use to the husband and his heirs until the marriage had been omitted, still, under the doctrine of resulting uses before adverted to (g), he would have been entitled to an estate in fee simple in the lands, determinable in the event of the marriage taking place.

Conveyance
to use of
grantor or of
his wife.

Again, prior to the Statute of Uses, a man might have made a feoffment to feoffees and their heirs, to the use of himself for his life, or to the use of his wife for her life; so, since the statute, a conveyance made to A. and his heirs, to the use of the grantor for his life, or to the use of the wife of the grantor for her life, will vest a legal estate in the grantor or his wife, as the case may be, for his or her life, by virtue of the operation of the Statute of Uses. This again is a result which could not have been obtained at common law without the intervention of the statute. The common law held that a man could not make a conveyance to himself; and as, at the common law, the wife was considered to be a part of her husband, so he could not make any conveyance of lands to his wife. Here again the statute abated the rigour of the common law, and enabled conveyances to be made which before could not.

(g) *Ante*, pp. 18, 19.

It was a doctrine of law that a contingent remainder of an estate of freehold required an estate of freehold to support it, and that, if a prior estate of freehold should be created, which for any reason should fail before the contingent remainder was ready to come into possession, then the contingent remainder would fail altogether and would never become a vested estate. I mentioned this subject in a former Lecture (*h*). I stated that the same rule prevailed with regard to estates created by means of the Statute of Uses, as with regard to estates created at the common law (*i*). The following example may serve as an instance:—Suppose lands be granted to A. and his heirs, to the use of B. for life, with remainder to the use of the eldest son to be born of C., a bachelor, and the heirs and assigns of such eldest son. If now C. has a son born during the life of B., then that son when born becomes entitled to a vested remainder in fee simple; and, after the death of B., he will have a right to enter upon the estate, and will be tenant in fee simple in possession. But if B. should die before C. has a son, then the contingent remainder to the eldest son of C. will be void for want of an estate of freehold to support it; and if C. should marry and have a son born after the death of B., such son can take nothing (*k*). A distinction, however, was drawn between a contingent remainder and a springing use to arise on a future event, when that springing use was not attempted to be supported by any prior estate of freehold. If the use limited were a use in remainder, it followed the law of remainders, and took its chance of happening in the lifetime of the prior tenant for life. But, if there were no prior life estate, then the use, not

Contingent
remainder.

Springing
use.

(A) Lectures on the Seisin of the Freehold, pp. 189—191.

(i) *Ibid.* p. 192.

(k) But if the grant was made after the 2nd of August, 1877,

the date of the act 40 & 41 Vict. c. 33, to amend the law as to contingent remainders, the son of C. would take by force of that act.

Example.

being attempted to be supported by a particular estate of freehold, would take effect on the happening of the contingency. For example,—Suppose a grant were made to A. and his heirs, to the use of the eldest son whom C., a bachelor, may have, and the heirs and assigns of such eldest son; if C. should marry and have a son, such son will, on his birth, take, by virtue of the Statute of Uses, an estate of freehold in fee simple in the land. The use limited to him is not a contingent remainder; for a remainder is that which is left after the creation of a particular estate; but it is a *springing use*, to arise on a future event; and such a use is held to be one which the Statute of Uses will execute, or turn into a legal estate, when the event happens on which it is limited. The distinction is rather a fine one; and, in the construction of limitations of this kind,

No limitation construed as a shifting use if it can take effect as a remainder.

the rule always is, that no limitation shall be construed as a shifting or springing use if it can possibly take effect as a contingent remainder. If it could take effect as a contingent remainder, it was left to take its chance as such a remainder, and must have come into effect at or before the termination of the prior estate of freehold, if it took effect at all. The examples of this rule, which have occurred in practice, have generally arisen in the case of wills. Every kind of contingent remainder and shifting

Wills.

or springing use, which is permitted in a deed operating under the Statute of Uses, is allowed to be made by will directly, without any reference to that statute; and, in such a case, that which would be a springing or shifting use in a deed is called in a will an *executory devise*. The case of *Hopkins v. Hopkins* (1) affords a good example of a limitation which, in the circumstances that happened, was at one time construed as an executory devise and at another time as a contingent remainder. Mr. Hopkins by his will devised his real

Executory devise.

Hopkins v. Hopkins.

(1) Cases temp. Talbot, 43.

estate to trustees and their heirs, to the use of them and their heirs, in trust for his grandson Samuel Hopkins (the only son of John Hopkins, who was the only son of the testator, and the plaintiff in the suit) for his, Samuel Hopkins's, life, and after his decease, in trust for the first and every other son of Samuel Hopkins and the heirs male of the body of every such son; and for want of such issue, *in case John Hopkins (the plaintiff) should have any other son or sons*, then in trust for all and every such son and sons respectively and successively for their respective lives, with the like remainders to their several sons, with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of Samuel Hopkins; and, for want of such issue, in trust for the first and every other son of the testator's grand-daughter Sarah, the eldest daughter of John Hopkins, with like remainder to the sons of John Hopkins's other daughters; and, for want of such issue, then in trust for the first and every other son of the testator's cousin Anne Dare, the wife of Francis Dare, with like remainders to the heirs male of the body of every such son of the said Anne Dare; and for default of such issue, in trust for the testator's own right heirs for ever. Samuel Hopkins, the testator's grandson, and the first person for whom the testator's real estate was to be held in trust, died in the lifetime of the testator without issue. Then the testator died without having altered his will; and at that time John Hopkins, his son, had no other son, nor were any of the other remaindermen *in esse* at the testator's death, except a son of Anne Dare. The testator, you see, entirely cut out his only son and also all his granddaughters. "He could not," as Lord Hardwicke afterwards remarked (*m*), "frame a will that no one should take his estate; if he could, it is likely he would have done it."

(*m*) 1 Atkyns, p. 589.

The question then arose, whether the limitation in trust for the first and every other son of John Hopkins could take effect as an executory devise, or whether it should be taken as a contingent remainder. The Lord Chancellor Talbot in his judgment said, "It seems to be allowed that, if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of Samuel's estate which would have supported it; . . . and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So, on the other hand, it is likewise clear that, had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it, and consequently not able to enure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend;" and he goes on, "The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent as far as possible: and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves;" and further on, "I think that, in this case, the limitation would operate as an executory devise if it was of a legal estate, and therefore shall do so as a trust, the rules being the same." Here you will observe that, if Samuel Hopkins, the grandson, had been living at the death of the testator, there would have been a limitation in trust for him for life, with remainder to the other sons of his father John Hopkins for their lives successively. The remainders to these sons would have been clearly contingent remainders; and, if the limitation had not been a trust but a limitation of the legal estate, and Samuel Hopkins had survived the testator, and afterwards had died, and afterwards John had had

another son, such son could not have taken, on account of the rule that a contingent remainder must vest during the continuance of the particular estate or immediately on its determination. But inasmuch as Samuel Hopkins died in the lifetime of the testator, his life estate was out of the way at the death of the testator when the will took effect. The first limitation contained in the will was therefore a limitation to the other sons to be born of John Hopkins. This limitation, having no estate for life preceding it, was not a remainder expectant on any particular estate, but could only take effect as an executory devise, which, as the Lord Chancellor said, is of the same nature with a springing use. It was held, that any other son of John Hopkins, if born, would be entitled for his life by way of executory devise. Subsequently to the decree of the Lord Chancellor Talbot, John Hopkins had issue a second son, William, who died soon after his birth, and the case came again before the court, Lord Hardwicke being then Lord Chancellor. It is reported at this stage in the first volume of Atkyns' Reports (*n*), as well as in a note to Cases temp. Talbot (*o*). The plaintiff, the eldest son of Hannah Dare, having attained twenty-one, brought his bill to have a settlement made by the trustees and to have an estate limited to himself in possession, on the ground that the contingent trusts in favour of the future unborn sons of John Hopkins and his sisters, having become contingent remainders by the birth of John's second son William, failed by reason of their not having been ready to come at once into possession on William's death. Lord Hardwicke held that, by the vesting of the estate in William Hopkins the second son for his life, the subsequent limitations were to be considered as turned into contingent remainders; and if the limitation had been a limitation of the legal

(*n*) Page 581.

(*o*) Page 52.

estate, such contingent remainders would have fallen and been defeated, unless they had come into vesting during the continuance of the particular estate of William Hopkins. The court, however, held that, inasmuch as, in this case, the whole fee simple was vested in the trustees by reason of the limitation to the use of them and their heirs, contained in the will, the legal estate, so vested in them, was sufficient to support the contingent remainders; by which, the Chancellor said, he would be understood to mean such of the remainders only as could be supported by the rules of law, and not the remote ones to the sons unborn of sons unborn. His lordship dismissed the plaintiff's bill, and held that the estate must remain in the hands of the trustees to see whether John Hopkins or any of the testator's daughters would have a son that should attain the age of twenty-one years. This case, therefore, illustrates the rule, that no limitation shall be construed as a shifting use or executory devise if it can be construed as a contingent remainder. If it cannot be construed as a contingent remainder, by reason of there being no prior estate for life or other particular estate of freehold, then the limitation may take effect as a shifting use or executory devise; and, as such, will be good, and not liable to be defeated in the same manner as a contingent remainder may be. But, if there be a prior estate of freehold, then every subsequent contingent limitation that is expectant on the determination of that estate, must be a contingent remainder; and, as such, must be subject to the rules to which contingent remainders are subject. These rules I mentioned in a former Lecture (*p*). Contingent remainders of the legal estate were liable to be destroyed by their not vesting at or before the determination of the particular estate on which they depended. If, however, the whole

fee simple is vested in trustees, and the contingent remainders are merely of an equitable kind, then the rules as to their destruction which would have taken effect had they been contingent remainders of the legal estate, have no longer any operation; but the remainders take effect according to the intention, subject only to the rules which have been established with regard to remoteness. These rules I will now endeavour to sketch out.

The courts seem always to have entertained a great dread of the inconvenience likely to arise by permitting landed property to be destined in futurity for any lengthened period, in such a way as to prevent its alienation. I showed, in a former Lecture (q), how the Statute de Donis—the object of which was to make estates tail inalienable—was practically set aside by a decision of the judges in *Taltarum's case*; by which a common recovery was allowed to be suffered by a tenant in tail, so as to bar the entail to his issue, and all remainders over limited to take effect on failure of his issue. After the passing of the Statute of Uses, the court, in *Chudleigh's case* (r), decided, that a contingent remainder created by way of use under the statute was as much liable to destruction as a contingent remainder created at the common law. But, as we have seen (s), the Statute of Uses, by uniting the legal estate to the use or trust, created legal estates of a kind unknown to the common law, and, amongst them, estates taking effect as springing or shifting uses in the manner which I have just described. It is obvious that if an estate could be made to shift away from the present owner of the freehold at an indefinite period of time, all the evils arising from the destination of the property in perpetuity would at once be let in. The necessity therefore arose

Remoteness.

(q) Lectures on the Seisin of the Freehold, p. 154.

(r) 1 Rep. 113 b.

(s) *Ante*, p. 21.

for limiting the period within which a springing or shifting use in a deed, or an executory devise in a will, might take effect. The period was fixed upon by degrees by successive decisions. It was decided that a springing or shifting use, or an executory devise, might be allowed to take effect at any time during the life of a person in being at the date of the deed, if a use, or at the death of the testator, if a will (*t*). It was further decided that, in addition to a life in being at the time when the settlement takes effect, the further term of twenty-one years, corresponding to the minority of the *cestui que use* or devisee, might be added, within which a shifting or springing use or executory devise might lawfully take effect (*u*). It was then further decided that any number of lives might be taken; and that it was sufficient if the springing or shifting use or executory devise took effect before the decease of the survivor of the persons taken (*x*). It then became a question whether this term of twenty-one years might be a term absolute, or whether it must necessarily be a term corresponding with the minority of some person interested under the settlement. And it was held that it might be a term absolute; and it was further held that, beyond the twenty-one years, the period might still be extended in the case of a child *en ventre sa mère*, begotten but not actually born (*y*). In such a case the period of gestation was also allowed, if gestation actually existed. And here the law has stopped; and the rule is, that a shifting or springing use, or an executory devise, may take effect within a life or lives in being, and twenty-one years after the decease of the survivor, and also during the period of gestation, if gestation exist; but if the spring-

The rule.

(*t*) *Duke of Norfolk's case*, 3 Ch. Ca. 1; Pollexfen, 223; 2 Swanst. 454. (*x*) *Thellusson v. Woodford*, 11 Ves. 112.
 (*y*) *Cadell v. Palmer*, 10 Bing. 140.
 (*u*) *Stephens v. Stephens*, Cases temp. Talbot, 228.

ing or shifting use, or executory devise, be so framed as that it may *in any event* exceed this limit, then the whole is void for remoteness, or as tending to a perpetuity.

Thus suppose a conveyance be made to A. and his heirs, to the use of such son of B., a bachelor, as shall first attain the age of twenty-one years, this is good as a shifting use, and it is not void for remoteness. It is good as a shifting use, because there is no prior life estate on which it depends; and it is not void for remoteness, because by no possibility could the limitation vest beyond the period of twenty-one years from the death of B., including the period of gestation in case B. should die leaving his wife *enceinte* of a son. But if land be conveyed to A. and his heirs, to the use of the first son of B., a bachelor, who shall attain the age of twenty-two years, this limitation is void altogether for remoteness. It is true that B. might have a son who would attain twenty-two years in his lifetime; or within twenty-one years after his death; but it is possible that his first son who attains the age of twenty-two years may attain that age beyond the period of twenty-one years from his decease; and, as that is the case, the whole is void for remoteness, because it is not, in every event which may happen, completely within the period limited.

The rule which I have just laid down I believe to be the true one. I think, however, I ought to mention that, according to some authorities, this rule is not strictly true in every case; but is subject to an exception in case two or more persons *in esse* at the date of the settlement, or perhaps *in esse* at any time during the prescribed period, should be able by their joint concurrence to alienate the land. If this should be the case, it is thought that a limitation so circumstanced would not

Alleged exception to the rule in case alienation can be made by concurrence of parties interested.

be void for remoteness. I apprehend, however, that this is not so. The vice appears to me to consist in the fact that, within the prescribed period, the estates to be held in the property may possibly remain unascertained; and I do not think that this vice is cured by the fact that all the persons, who on any contingency may be entitled, are in being, and may together make a good title, by each one giving up his contingent right. To take a simple case, I apprehend that if property is so settled that, on an event which may happen beyond given lives in being and twenty-one years and nine months from the decease of the survivor, it may belong either to A. and his heirs or to B. and his heirs, this settlement is void for remoteness; although A. and B. together could no doubt make a title, as in any event the property must belong to one or the other. The terms in which the rule is usually laid down undoubtedly go to the extent of making such a settlement void. Some remarks of the Courts of Exchequer and Exchequer Chamber in the case of *Gilbertson v. Richards* (z) have been thought to countenance the exception adverted to. But, as Lord St. Leonards remarks in his treatise on Powers (a), no perpetuity was created in that case: and of this opinion the Court of Exchequer Chamber seems to have been. And the remarks of the court must be taken as made only *secundum subjectam materiem*. There is a case, however, where it was actually decided that a limitation, which would otherwise have been confessedly void for remoteness, was rendered valid by the gift over being in favour of persons, all of whom were born within the prescribed period. The case to which I allude is that of *Avern v. Lloyd* (b), decided by Vice-Chancellor Stuart. In this case the limitation to the survivor of a class of unborn persons was held good, because the

*Gilbertson v.
Richards.*

*Avern v.
Lloyd.*

(z) 4 Hurl. & Norm. 277, 297,
affirmed 5 Hurl. & Norm. 453,
459.

(a) Sugden on Powers, p. 16,
8th ed.

(b) L. R., 5 Eq. 383.

whole of the class came into existence within the prescribed period. This case has however been questioned, and, as I venture to think, very justly, by Vice-Chancellor Malins in the recent case of *Stuart v. Cockerell* (c). And in the case of *Re Edmondson's Estate* (d), the report of which immediately follows that of *Avern v. Lloyd*, a limitation exceeding the prescribed period was admitted on all hands to be clearly void, although, as in *Avern v. Lloyd*, the limitation was in favour of surviving children, all of whom were born in due time; and who, by concurring together, could undoubtedly have made a title to the property. The gift was to the children of A. B. in equal shares, with a proviso that if any of them should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors and survivor. "Of course," said Vice-Chancellor Wood, now Lord Hatherley, in his judgment (e), "the gift over on the death of children under twenty-five is void for remoteness." And yet, as in *Avern v. Lloyd*, the gift over was confined to the surviving children, to one or other of whom the whole must have gone. I submit, therefore, that if, in any event, a limitation of a future kind may transgress the limits, it is void for remoteness; and that the fact that the only persons who may be thereby benefited are well known and ascertained, is not sufficient to render it valid.

Questioned
by Vice-
Chancellor
Malins.

*Re Edmond-
son's Estate.*

Where a gift is made to a class of persons, the whole class must be ascertained within the period limited, otherwise the whole gift will be void for remoteness. It is not enough that the minimum shares of some of the class are ascertained within the period. The share that each member of the class takes must be fixed and ascertained; and the court cannot sever the minimum

Gift to a
class.

(c) L. R., 7 Eq. 363, 369. And
see *Re Brown and Sibly's Contract*,
L. R., 3 Ch. D. 156.

(d) L. R., 5 Eq. 389.
(e) Page 398.

share of any member of the class from the rest of his share, holding the gift good as to the minimum share and void beyond it. The entire gift fails if the uncertainty as to the amount of the several shares may exceed the limit fixed for the avoidance of perpetuities (*f*).

(*f*) *Smith v. Smith*, L. R., 5 *v. Duke of Portland*, L. R., 7
Ch. 342; *Hale v. Hale*, M. R., Ch. D. 693.
L. R., 3 Ch. D. 643; *Bentinck*

LECTURE III.

ONE of the results of the passing of the Statute of Uses—apparently the most unforeseen by the framers of that Act—was the manner in which, by virtue thereof, lands may now be conveyed from one person to another by means of *powers of appointment*. Before the Statute of Uses was passed, persons, as we have seen (*a*), made feoffments of their lands to other persons and their heirs, to certain uses or upon certain trusts. And it appears, from the preamble of the statute, that one of the grievances which that statute intended to remedy was, that “the hereditaments of this realm were conveyed from one to another by assurances craftily made to secret uses, intents and trusts, and also by wills and testaments, sometime made by parol and words, sometime by signs and tokens, and sometime by writing” (*b*). There is no doubt that feoffments to uses were much resorted to before the statute in order to enable persons to dispose of their lands by will. The feoffment was made to trustees in fee, upon confidence and intent to perform the last will of the feoffor (*c*); and, in this case, the use or beneficial interest in the lands passed by the will of the feoffor, however informally that will may have been made. The Statute of Uses, however, instead of remedying the evils resulting from the conveyance of the beneficial interest in lands by mere writing, without solemn feoffment and livery of seisin, in fact added to the supposed evil which it was intended to remedy. The statute annexed the legal estate to the use or trust; and the consequence was that, instead of the mere use

Powers before
the Statute of
Uses.

Effect of the
statute.

(*a*) Lectures on the Seisin of
the Freehold, p. 134.

(*b*) *Ibid.* p. 138.

(*c*) Litt. sect. 462.

or trust of the lands being disposable by writing or testament, the lands themselves became subject to be disposed of by mere writing in the exercise of powers of appointment.

Wills of uses
abolished.

The Statute
of Wills.

Appointments
of legal
estate.

Lord Eldon's
explanation.
Maundrell v.
Maundrell.

With regard to wills of uses or trusts, the statute put an end to them by turning the use or trust into a legal estate, which could not at that time be devised by will; at the same time providing that wills made before the 1st of May, 1536, should be as effectual as before the statute. This wholesale destruction of the testamentary power previously exercised over the use or trust no doubt gave occasion to the passing, about six years afterwards, of the Statute of Wills (*d*); by which every person was enabled by his last will and testament in writing to devise all his lands of socage tenure and two-thirds of his lands held by knights' service. But, with regard to powers of appointment, the statute simply transformed that which, before the statute, would have been an appointment of a use, into an appointment of a legal estate; thus conveying the legal estate in a manner which before was unauthorized (*e*). For instance,—A conveyance of land may, since the Statute of Uses, be made to A. and his heirs, to such uses as A. shall appoint by deed or will, or even by mere writing under his hand, and in default of any such appointment and subject thereto, then to the use of himself, his heirs and assigns for ever. "It was an ordinary thing," says Lord Eldon, in the case of *Maundrell v. Maundrell* (*f*), "for a man to suffer a recovery of an estate of which he was tenant in tail, to declare that the recovery should enure to such uses, intents and purposes as he should appoint, and in default of appointment, and as to so much of the interest of which there should be no appointment, or as should not be exhausted by

(*d*) Stat. 38 Hen. VIII. c. 1. Jones, 7.

(*e*) *Mytton v. Lutwich*, Sir Wm. (*f*) 10 Ves. 254.

appointment, that the estate should enure to himself in fee; and the great names I have mentioned" [which were those of Mr. Booth, Mr. Fearne, and other eminent conveyancers] "confirmed by their practice what Mr. Butler states,—that the fee vests until execution of the power, and the execution of that power, in the words of Mr. Booth, is the limitation of a use under, and by the effect of, the instrument by which the power was reserved." "Suppose," he continues, "the lease for a year was not executed, having been forgot, or had not a proper stamp, the release would have no operation; but the execution of the power would have limited a use to the persons named, and the use would engraft itself upon what Mr. Booth calls *scintilla juris* (g) in the re-lessees; and those persons named in the execution of the power would have taken precisely as if they had been persons to whom uses were limited in the original deed. Take the ordinary case of a marriage settlement, with a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years is almost as inconsistent with his interest as a power to limit the fee with that of tenant in fee. But when the tenant for life executes the power, the effect is not technically making a lease, but that lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years, antecedent to the life estate and the subsequent limitations."

Power of
leasing.

Now nothing of this kind could have been effected at the common law; nor can anything of the kind now be effected with respect to such estates and interests as are not within the purview of the Statute of Uses. At the common law an estate may be granted to A. for life,

The common
law.

(g) *Ante*, p. 9.

At the common law a power to lease cannot be given.

A power to lease leasehold property cannot be granted.

Mortgage of leaseholds: power to mortgagor to lease cannot be given.

Mortgage of freeholds: power to lease may be given.

with remainder to B. in fee; but it is impossible by any means, without the aid of the Statute of Uses, to authorize A., the tenant for life, to grant a lease of the property, to take effect out of the estate of B., and to be binding on B. after the decease of A. during the continuance of the term granted by the lease. So now, in the case of property held on lease for a term of years, a power over such property cannot be reserved or granted, because the Statute of Uses requires that some person should be *seised* to the use in order that the statute should execute such use or turn it into a legal estate. A man is *possessed* of land for a long term of years, but he is not *seised* of land during the term. The seisin is peculiar to the freeholder (*h*). If, therefore, a mortgage be made of property held for a term of years, and it be wished that, notwithstanding the mortgage, the mortgagor or borrower should have a power to lease the land, there are now no means known to the law by which this can be done. But in the case of a freehold the law is otherwise. The Statute of Uses enables a power to be inserted in the mortgage, enabling the mortgagor to lease any part of the lands mortgaged upon such terms as may be agreed upon. The lands are conveyed to the mortgagee and his heirs, to the use of the mortgagee, his heirs and assigns, but subject to the power of leasing intended to be granted, and subject to redemption on payment of the mortgage money and interest. The insertion of the power of leasing shows an intention that the Statute of Uses should operate. In this case, therefore, the mortgagee is not *in* by the common law, but is *in* by virtue of the Statute of Uses; and the moment the mortgagor exercises his power of leasing, he appoints the use or trust of the land to the tenant for the term of years authorized by the power. The Statute of Uses turns this use or trust into an

(h) Lectures on the Seisin of the Freehold, p. 4.

estate for years in possession. The mortgagee becomes seised to the use of the tenant for the term of years, and the two instruments together, the mortgage and the lease under the power, have precisely the same effect as if the land had been conveyed to the mortgagee and his heirs, to the use of the tenant for the term of years mentioned in the deed of appointment executed under the power of leasing, and subject thereto to the use of the mortgagee, his heirs and assigns, subject to redemption on payment of the principal money and interest intended to be secured by the mortgage.

Powers of appointment are either *general powers* General powers. authorizing an appointment of the use in favour of any person or persons whom the appointor may please, or they may be *limited powers*, as power to grant leases for a certain term and at a given rent, or powers to appoint property amongst children or other issue of a marriage, Limited powers. or powers to limit a jointure to a wife on marriage, or to charge portions in favour of younger children in cases where the land itself is settled on the eldest son. Powers are also sometimes what is called powers *in gross*, Powers in gross. that is, powers given to a person who has no estate or interest limited to him in the land over which the power extends. Thus, lands may be conveyed to A. and his heirs to such uses as B. shall appoint, and, in default of appointment, to the use of A., his heirs and assigns. Here B. has no estate or interest in the lands; he has a mere power of disposing of them as he pleases; and by the execution of the power of appointment he may appoint the use in any manner he pleases. He may, if he likes, appoint the lands to the use of himself, his heirs and assigns, and he will then become legal tenant in fee simple of the lands. Or he may appoint to any other person or persons, his or their heirs or assigns, or for life, or in tail, or for any other estate allowed by law; and the appointees will immediately become seised,

- by virtue of the Statute of Uses, of the lands appointed, according to the estate which may be limited or marked out by the instrument by which the appointment may be made. The estate to A. in fee, which vests in him until the appointment is made, becomes divested or displaced. So a power may be *appendant* to a life estate or any other estate; and in this case the exercise of the power by the tenant for life or owner of the estate in question, has the effect of partially defeating his own estate. Thus, if a power of leasing for a term absolute be given to a tenant for life, the exercise of this power partially defeats his own estate; for it gives the tenant named in the lease legal possession of the land leased during the continuance of the term of years mentioned in the instrument by which the power is executed. So, if a tenant for life has power to charge a sum of money on the settled lands by way of mortgage, the exercise of this power partially defeats the estate of the tenant for life. So if, in a settlement, a power is given to the trustees of the settlement to sell or exchange the settled land, with the consent of the tenant for life, in this case the tenant for life's power to consent is said to be a power *appendant* to his life estate.
- Power ap-
pendant.**
- Power of
leasing.**
- Power to
charge the
settled lands.**
- Power to con-
sent to sale
or exchange.**
- General
power equi-
valent to
ownership.**
- A general power of appointment, that is, a power to appoint to such persons, for such estates, and in such manner as the appointor may think fit, is evidently equivalent to the power of disposition which results from ownership. If land has been conveyed to A. and his heirs, the estate which he takes gives him, by law, a power to grant by deed, and also, under the Statute to amend the laws with respect to wills (i), a power to devise by will. But A. may have a power to convey land, either by deed or by will, without having any ownership therein. This is effected by conveying the

(i) Stat. 7 Will. IV. & 1 Vict. c. 26.

lands to any person or persons in fee, to such uses and in such manner as A. may by deed or will appoint. Such a general power of appointment is equivalent to absolute ownership, and is looked upon by the law in that light. Thus, if A. should become bankrupt, the trustee for his creditors is enabled by the Bankruptcy Act, 1869 (*k*), to exercise in favour of any persons, for the benefit of his creditors, all such powers, in or over or in respect of property, as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice. So, if A. should exercise his power by will in favour of a volunteer, or person not claiming for valuable consideration, the property appointed would be subject, in the hands of the appointee, to the debts of the appointor (*l*). But, in order to produce this effect, the power of appointment must be actually exercised by the appointor (*m*); and then the property appointed will not be resorted to until the whole of the testator's own property, even though it may be specifically bequeathed, shall first have been resorted to and exhausted in the payment of his debts (*n*).

Bankruptcy.

Debts of appointor.

Real estates over which a person has any disposing power, which he may, without the assent of any other person, exercise for his own benefit, are liable to be taken in execution on any judgment recovered against such person, even although the power be not exercised (*o*). But no judgment entered up after the 29th of July, 1864, can now affect any land until the land

Judgment debts of owner of power.

(*k*) Stat. 32 & 33 Vict. c. 71, s. 15, sub-s. 4.

(*m*) *Holmes v. Coghill*, 7 Ves. 499.

(*l*) *Lord Townshend v. Windham*, 2 Ves. sen. 1; *Fleming v. Buchanan*, 3 De Gex, M. & G. 976; see the author's Essay on Real Assets, p. 12.

(*n*) *Fleming v. Buchanan*, *ubi supra*.

(*o*) Stat. 1 & 2 Vict. c. 110, ss. 11, 13.

shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment (*p*).

General devise by donee of a general power.

The Act to amend the laws with respect to wills (*q*), treats the possession of a general power of appointment as a species of ownership. For it provides (*r*) that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. Before this Act, if a man had lands of his own of which he was seised in fee, and also had a general power of appointment over other lands, and made a will containing a general devise of all his real estate, those lands only passed of which he was seised in fee, and those which were subject to be appointed by him were not considered to have been appointed by such a devise. This enactment extends only to powers which a man may have to appoint *in any manner he may think proper*; and, therefore, it does not apply to a limited

General bequest by donee of general power.

(*p*) Stat. 27 & 28 Vict. c. 112. c. 26.

(*q*) Stat. 7 Will. IV. & 1 Vict. (*r*) Sect. 27.

power to appoint property amongst a man's children or any other limited class of persons (s). A power so limited is not tantamount to ownership; and a person having merely such a limited power must exercise it according to its terms.

There is another view in which a general power of appointment is looked upon as equivalent to absolute ownership, and that is with respect to the rule of perpetuity, to which I adverted in my last Lecture (t). Every power, whether general or limited, has, when exercised, the effect of engrafting the estates appointed under the power in the deed or settlement by which the power is created. If the power is a limited power only, then, in so far as the power is limited, the property to be appointed under it is tied up, or taken out of general alienation, from the date of the instrument by which such limited power is created. But if the power is a general power of alienation, it of course does not tie up the property subject to it; and if, in the exercise of such a power, future estates are created, the period of lives in being and twenty-one years afterwards (u) runs from the time of the exercise of the power, and not from the time of its creation.

General power with reference to perpetuity.

An appendant power, or a power of appointment annexed to some estate, the interest of the appointor in which estate may be more or less divested by the appointment, may be suspended or extinguished by an entire or partial alienation of the estate to which the power is appendant. Thus if A. be tenant for life, with power of leasing, and he then conveys his life estate to B., his power of leasing is suspended during the remainder of his life; for it would not be fair to B., who

Suspension or extinguishment of powers appendant.

Leasing.

(s) *Evans v. Evans*, 23 Beav. 1;
Wildbore v. Gregory, L. R., 12
Eq. 482.

(t) *Ante*, p. 30.
(u) *Ante*, p. 30.

Power to consent to sale.

Alexander v. Mills.

has purchased the remainder of the life interest, that A. should derogate from his own grant by exercising the power to grant leases. So, if A. be tenant for life, with a power to the trustees of the settlement, with his consent, to sell the settled property, and invest the proceeds in the purchase of other estates to be settled to the same uses; here if A. should part with his life estate, it would evidently be unfair to the purchaser of the life estate, that A. should consent to a sale by the trustees of the whole property, even although the purchase-money should be invested in the purchase of other lands to be settled in the same manner. It was at one time thought that an absolute alienation by A. of his life estate extinguished his power of consenting to any sale or exchange by the trustees, even although the alienee should concur in consenting to the exercise of the power. But this was held otherwise in the recent case of *Alexander v. Mills* (x). In this case, by a settlement made on the marriage of one Hicks, certain freehold estates were conveyed to trustees and their heirs, to the use of Hicks for life, with remainder (subject to powers for raising money for the benefit of Hicks and for jointuring) to certain uses in favour of the children of Hicks, with an ultimate limitation, in default of issue, to the use of Hicks in fee. And it was declared that it should be lawful for the trustees, during the life of Hicks at his request in writing to sell or exchange all or any part of the hereditaments thereby conveyed at such prices as to the trustees should seem reasonable. There was no issue of the marriage, and the jointuring powers were not exercised. Hicks then conveyed the settled property for valuable consideration unto and to the use of the plaintiff Alexander, his heirs and assigns, for the life of Hicks, and during every other estate and interest which Hicks then had or could dispose of both

(x) L. R., 6 Ch. 124.

at law and in equity. New trustees were then appointed of the settlement; and these trustees, in exercise of the power of sale, at the request and by the direction of Hicks, conveyed the whole property for a valuable consideration to the plaintiff in fee. The plaintiff then sold the property to the defendant, who objected to the title on the ground that Hicks, having conveyed away his life estate, could not subsequently consent to the exercise by the trustees of the power of sale; and of this opinion was Lord Romilly, the late Master of the Rolls. But upon appeal this decision was reversed, and a good deal of the technicality by which this subject was formerly considered to have been surrounded was swept away. It was said that the retention by Hicks of his life estate was not made, by the settlement, a condition for the exercise by him of his power to consent to any sale to be made by the trustees. And of course the objection that he could not in fairness derogate from his own grant, was obviated by the express concurrence of the grantee, who in this case was himself the purchaser from the trustees of the fee simple.

In order that an appointment under a power may be effectual, of course it is necessary that the terms of the power should be pursued. A power to appoint by any instrument under hand and seal must be exercised by an instrument under the hand and seal of the appointor (*y*). But whether that instrument be a deed, or whether it be a will, is immaterial, provided that it be under hand and seal. But if the power to appoint is required to be exercised by will, then it now matters not what kind of execution or attestation the power may require. For even should the power of appointment require that the will should be executed in the presence of half a dozen witnesses, it will, so far as its

Terms of
power to be
pursued.

Power to ap-
point by will,
execution and
attestation.

(*y*) *Taylor v. Meade*, L. C., 11 Jur., N. S. 166; 4 De Gex, J. & S. 597.

execution and attestation are concerned, be valid, if it be in writing and executed and attested as required by the Act for the amendment of the laws with respect to wills (c); namely, signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, such signature being made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses attesting and subscribing the will in the presence of the testator. For the Act for the amendment of the laws with respect to wills enacts (a), that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner thereinbefore required, and every will, executed in manner thereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Power to appoint by deed, execution and attestation.

A later Act (b) has made a somewhat similar provision with regard to the execution of deeds of appointment under powers. It provides that a deed, executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity. Provided always

(c) Stat. 7 Will. IV. & 1 Vict. c. 26.

(b) Stat. 22 & 23 Vict. c. 35, s. 12.

(a) *Ibid.* s. 10.

that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any Act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing therein contained is to prevent the donee of a power from executing it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed; and to any such execution of a power this provision is not to extend.

So that, if the power requires a deed, or any instrument in writing not testamentary, the donee of the power has his option either to comply with the requisition of the power in the matter of execution and attestation, or he may avail himself of this clause of the statute and execute the power by a deed executed by him in the presence of and attested by two or more witnesses in the usual way. Whereas, in respect of wills, it is absolutely incumbent on the person who exercises a power of appointment by will, to have his will executed and attested in the manner required by the Wills Act; although such manner of execution and attestation may be directly contrary to the requisition of the power.

The requisitions of powers with regard to the number of witnesses and other incidents to the execution and attestation of the instruments executing such powers, were frequently overlooked; so that, strictly speaking, and at law, the appointment was not a good execution of the power. But, in favour of certain persons, the Court of Chancery aided the defective execution of a power, and considered that the appointment was good, notwithstanding any defect in execution or attestation. The jurisdiction of the Court of Chancery in this respect

Equitable aid
to defective
execution of
power.

extended also to the supplying of a surrender to the use of a will, in the case of copyhold lands, in the times when it was necessary to make a surrender of copyhold lands to the use of a will in order that they should be devised by the owner thereof. In favour of a *purchaser for valuable consideration* from the person to whom the power was given, or in favour of a *creditor* of such person, or of his *wife*, or of any of his *children*, and also in favour of any *charitable object* to whom any appointment was intended to be made, the Court of Chancery supplied the defect in the execution of the power and held it good. In favour of the same persons it also supplied a surrender of copyholds. But its favour in this respect was strictly limited to the persons above named. It would not aid the execution of a power, or supply a surrender of copyholds in favour of a grandchild, or other more remote issue of the appointor, nor in favour of his natural child, nor in favour of a stranger not a purchaser for valuable consideration, but a mere volunteer. And it seemed doubtful whether it would aid the execution of a power, or supply a surrender of copyholds as against a son and heir totally unprovided for. This point seems never to have been settled; and is not now likely to arise in the case of copyholds, inasmuch as copyholds can be devised by will, either with or without a surrender to the use of the will, as the testator may think fit. The law upon this subject appears to have entirely arisen from the decisions of the Court of Chancery, which interfered on behalf of persons whom they thought it hard to exclude by a mere slip in the execution of the power; but refused to interfere in favour of other persons, whom the court did not suppose to have the same claim upon their favour.

I propose to say more concerning Powers when I come to speak of the different powers usually inserted in ordinary settlements of lands. We have seen, there-

fore, that the Statute of Uses was the means of enabling many assurances to be made which could not have been effected at the common law. It enabled a person to obtain actual legal seisin of lands without any feoffment or livery of seisin made to that person (*c*). It enabled a man to convey to himself, and also to convey to his wife (*d*). It also enabled lands to be given for an estate in fee or any other estate, and yet to be made to shift away from the person to whom they were so given on the happening of any event within the limits of perpetuities, by means of shifting or springing uses (*e*). And it also enabled the springing or shifting use to arise by means of the exercise of a power of appointment, which power may be vested either in any person who has an estate in the lands, or in a person having no estate or interest therein (*f*); and also may be either a general power, or limited in favour of particular objects (*g*).

Summary.

In the next Lecture I intend to consider the subject of *trusts* not executed or turned into legal estates by the Statute of Uses.

(*c*) *Ante*, p. 2.

(*d*) *Ante*, p. 22.

(*e*) *Ante*, p. 21.

(*f*) *Ante*, pp. 39, 40.

(*g*) *Ante*, p. 39.

LECTURE IV.

Uses not executed by the statute.

ONE of the most striking results of the Statute of Uses (a) was the continuance in some cases and the revival in other cases of those very uses or trusts which it was the object of the statute to annihilate. There are certain uses which are not executed by the statute, that is, uses which the statute does not turn into legal estates, but leaves them as they were before the statute passed. Some of these I may mention.

Trust to receive rents and profits.

If a feoffment be made to A. and his heirs, to the use of the feoffor for his life, and after his decease to the intent that A. and his heirs should *receive the rents and profits* of the lands and pay them over to B., this trust for B. would not be a use or trust executed by the statute, so as to give B. any legal estate; because, in order that A. and his heirs should receive the rents and profits, he or they must have the legal estate in the lands vested in him or them. The result is, that a feoffment of this kind gives to the feoffor for his life an estate in the lands, so that he becomes seised for his life by virtue of the use for life limited to him, and there is then a remainder in fee vested in A., the feoffee, which gives him the legal estate in remainder expectant on the decease of the feoffor, and, after the feoffor's decease, he becomes seised of the lands in possession. But he is bound to pay the rents and profits over to B., and this makes him a trustee for B. in the same manner as he would have been if the Statute of Uses had never passed. So if there be a trust to pay over rents and

(a) Stat. 27 Hen. VIII. c. 10.

profits to a married woman for her *separate use*, here the trust will not be executed by the statute. The trustee must take the legal estate in order to enable him to pay over the rents and profits to the separate use of the married woman. It has, however, been held that, if a trustee has no active duty to perform in the receipt of the rents and their payment over to the separate use of the married woman, the statute will execute the use to her, although limited for her separate use, there being nothing in a limitation of this sort sufficient to restrain the operation of the statute. This was decided by the Court of Exchequer in a case of *Williams v. Waters* (b). This case also shows that there is no difference in the operation of the statute, whether the word used be *use* or *trust*, although undoubtedly it is the case that, when conveyancers wish the statute to operate, they generally use the words *to the use of*, and when they wish the statute not to operate, they generally use the words *upon trust for*. But no reliance can be placed on the use or disuse of these terms. The question, whether the statute operates or not, depends upon the question whether the trustees have an active duty to perform, and also upon another question to which I shall advert presently, viz.:—Whether there is or is not a use upon a use?

Trust to pay rents to a married woman for her separate use.

If trustee have no active duty.

Words "use" or "trust."

In the case of *Williams v. Waters*, Ann Waters, on her marriage with Hugh Williams, executed indentures of lease and release in the usual way. She first bargained and sold the lands for a year to W. R. Howell and John Williams; and then by the release she released the lands to W. R. Howell and John Williams and their heirs, to the use of herself, her heirs and assigns, until her marriage,—[this gave her the fee until her marriage]—and after the solemnization thereof,

Williams v. Waters.

(b) 14 Mee. & Wels. 166.

in trust for the said Ann and her assigns for her life for her own sole and separate use independent of the said Hugh Williams her intended husband, his debts, control or engagements; and from and after the decease of the said Ann, to the use of the said Hugh Williams, his heirs and assigns, for ever. It appeared that Ann Waters, prior to her marriage, had demised the premises to one Joseph Waters for ninety-nine years at a yearly rent of 164*l.* 9*s.*; and the rent was unpaid; and Hugh Williams and his wife brought an action for the rent. Upon which the defendant pleaded the marriage settlement, and insisted that the legal estate was in the trustees; that W. R. Howell had died, and John Williams his co-trustee was living, and was therefore the person who ought to have brought the action for the rent. The court held that the trust for Ann for her life for her separate use, independent of Hugh Williams her intended husband, and free from his debts, control or engagements, was *a use* which was executed by the Statute of Uses, and which accordingly gave her the legal estate during her life; so that the action for the rent was properly brought by herself and her husband. Baron Parke said: "Although, no doubt, it is highly probable that these parties intended to give the trustees the legal estate during the life of the wife, they have not used apt words for that purpose. We cannot collect clearly from the words of the deed that they intended to give the trustees an active trust—to exclude the husband from control by giving the estate to the trustees, in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife, although the husband is a trustee for her in equity." Baron Alderson: "I am of the same opinion. This case is within the very words of the Statute of Uses—'that where any person or persons shall stand or be seised of and in lands, &c., to the use, confidence or

trust of any other person or persons, &c., by reason of any bargain, sale, &c., in every such case all and every such person or persons, &c. that have or hereafter shall have such use, confidence or trust in fee simple, &c. shall from henceforth stand and be seised, and deemed and adjudged in lawful seisin, estate and possession of and in the same lands, &c., of and in such like estates as they had, or shall have, in use, trust or confidence of or in the same,' &c. This is clearly an estate in the trustees for the use of another, that is, the wife; and it is not less so because it is clogged with a condition which is inoperative at law. In cases of what are called active trusts, it is a use given to the trustees themselves, on which a use cannot be executed by the statute."

If the trust had been to *receive the rents*, and to pay the same to Ann for her life for her separate use, the legal estate would have vested in the trustees; and had the instrument to be construed been a will instead of a deed, the court would probably, in favour of the intention, have held that the legal estate was vested in the trustees.

Remarks on
Williams v.
Waters.

If the trust be a trust *to sell or convey*, then it is clear that this is a trust which the statute cannot execute; for the trustee must have the legal estate vested in him, in order to enable him to sell and convey. But, without the imposition of an active duty in the trustee, the legal estate may be conveyed to him, and a trust may be created binding in equity, simply by the limitation of a *use upon a use*. I adverted to this in a former Lecture (c). It was held, in the construction of the statute, that if a bargain and sale of lands was made by A., a person seised in fee, to B. and his heirs, to the use of C. and his heirs, that C. did not take the legal

Trust to sell
or convey.

Use upon a
use.

estate by the operation of the Statute of Uses. The bargain and sale made the bargainor a trustee for the bargainee; and, under the statute, the bargainee became seised; and the use declared upon his seisin was therefore a use upon a use, which use upon a use it was held that the statute did not execute or turn into a legal estate. By simply, therefore, making two uses instead of one, the whole intent of the statute was defeated, and trusts, which the statute intended to abolish, were set up again and enforced in Courts of Equity (*d*).

Trusts set up again.

Trust estates or estates existing only in equity still demand your attention. Although a change has been made, by the Supreme Court of Judicature Acts (*e*), in the machinery by which the rights of persons, entitled whether to legal or equitable estates, are administered, yet trust estates still remain, and it is necessary that you should be acquainted with their characteristics. As a general rule, it is said that, in regard to equitable estates, *equity follows the law*. Thus a trust estate descends, on the decease of its owner intestate, in the same manner as the legal estate would have descended. So the husband of a married woman is entitled to his estate by the curtesy in a trust estate as well as in an estate at law. There was one remarkable exception in the case of the dower of a widow. A widow was entitled to dower out of the legal estate of her deceased husband; but she was held not to be entitled to dower out of any estate held in trust for him. This, however, has been altered by the Act to amend the law relating to dower (*f*), which gives a widow a right to dower out of every estate of inheritance in possession, other than an estate in joint tenancy, to which her husband shall die

Equity follows the law.

Curtsey.

Dower.

(*d*) *Hopkins v. Hopkins*, 1 Atk. 591.

(*e*) Stats. 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

(*f*) Stat. 3 & 4 Will. IV. c. 105.

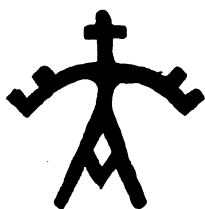
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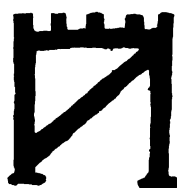
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*Manor of
West Ham*

beneficially entitled, whether such estate be wholly equitable, or partly legal and partly equitable. The same estates which exist in lands at law may be created in them in equity. A man may have an equitable estate for life, or he may have an equitable estate in tail, or he may have an equitable estate in fee simple. Before the Act was passed for the abolition of fines and recoveries (*g*), an equitable estate tail in lands was barred by means of what was called an *equitable recovery*; which was in fact a common recovery suffered of the lands, in the same manner as if the lands had been entailed at law. And in analogy to the rule which required that the owner of the legal seisin should be a party to the recovery, in order to make the *tenant to the præcipe* for the purpose of barring an estate tail at law (*h*), it was held (*i*), that the beneficial owner of the first equitable estate of freehold, if there were such an estate, must concur in order to make the tenant to the *præcipe* for the purpose of suffering a common recovery, in order to bar an equitable estate tail. The Act for the abolition of fines and recoveries (*k*), extends to estates tail in equity, as well as estates tail at law. And the consent of the protector, where a protector exists, is as much required in order to bar remainders expectant on estates tail in equity, as it is required to bar remainders expectant on an estate tail at law (*l*). And the same enrolment of the deed in the Chancery Division of the High Court of Justice within six calendar months after its execution, is required to bar an equitable estate tail as is required to bar an estate tail at law (*m*). And the Act expressly provides (*n*) that no disposition of

Estates in equity.

Equitable recovery.

Protector.

Enrolment.

(*g*) Stat. 3 & 4 Will. IV. c. 74.

De Gex, M. & G. 409.

(*h*) Lectures on the Seisin of the Freehold, pp. 156, 170.

(*k*) Stat. 3 & 4 Will. IV. c. 74.

(*i*) *Lord Grenville v. Blyth*, 16 Ves. 224; *Nouaille v. Greenwood*, T. & Russ. 26; *Penny v. Allen*, 7

(*l*) Lectures on the Seisin of the Freehold, p. 181.

(*m*) *Ibid.* 164.

(*n*) Sect. 47.

lands under the Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under the Act by a tenant in tail thereof in equity, shall be of any force, unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under the Act in a court of law. You may remember that, in a former Lecture, I adverted at length to the barring of estates tail by means of dispositions under this Act (*o*).

Equitable
conversion.

Equity considers that that which is agreed or directed to be done ought to be done, and ought, as far as all persons interested are concerned, to be treated as done. It accordingly holds that, if lands are directed to be sold, and the purchase-money invested in the purchase of other lands, or if money is directed to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased and settled, would have any estate therein, such person is in equity entitled to the estate which he was intended to have. The money, in that case, is considered to be real estate in equity, and to be descendible, as such, to the heir-at-law, or the heir of the body of any person who is to have an estate in fee, or, as the case may be, an estate tail, in the lands to be purchased, in the same manner as if they had been actually bought and settled. The Act for the abolition of fines and recoveries contains provisions applicable to circumstances of this nature (*p*). It enacts that lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested

(*o*) Lectures on the Seisin of
the Freehold, pp. 161 *et seq.*

(*p*) Stat. 3 & 4 Will. IV. c. 74,
s. 71.

in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an *estate tail* therein, shall, for all the purposes of the Act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in the Act, so far as circumstances will admit, shall, in the case of lands to be sold as aforesaid, except copyhold, apply to such lands, in the same manner as if the lands, to be purchased with the money to arise from the sale thereof, were directed to be freehold, and were actually purchased and settled, and shall, in the case of copyholds, apply to such lands, in the same manner as if the lands, to be purchased with the money to arise from the sale thereof, were directed to be copyhold, and were actually purchased and settled, and shall, in the case of money subject to be invested in the purchase of lands, to be so settled as aforesaid, apply to such money, in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; except that where the disposition shall be made under that clause of leasehold lands for years absolute, or money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate; and the assurance by which the disposition of such leasehold lands or money shall be effected, shall be an assignment by deed, which shall have no operation under the Act unless enrolled in the Chancery Division of the High Court within six calendar months after the execution thereof.

When, therefore, lands are thus directed to be purchased and settled so as to create an estate tail, you may disentail them before they are actually pur-

chased and settled, by conveying freeholds, assigning leaseholds, or surrendering copyholds, which may be directed to be sold and the money laid out in the purchase of lands to be settled, or by assigning the money itself, if the trust be simply to lay out money in the purchase of lands to be settled, the deed of conveyance or assignment being enrolled as required within six calendar months.

Money in court.

In some cases, where money has been in court subject to a trust to be laid out in the purchase of lands to be settled on a person in tail, with remainders over, the court has allowed the money to be paid out to such person without his executing a disentailing deed (*q*). This seems to me very much like a judicial repeal of a legislative enactment (*r*). And in a recent case (*s*), the present Master of the Rolls thought it would be better that a disentailing deed should be executed. The object appears to have been to save expense. But if Parliament has required a proceeding unnecessarily expensive, Parliament, and not the Judicature, should repeal the law.

Copyholds.

I mentioned in a former Lecture (*t*), that equitable estates tail in copyholds may be barred either by surrender, in the same manner as if they were legal estates, or by deed to be entered on the court rolls of the manor within six calendar months after the execution thereof.

Equitable estate in fee.

If lands are conveyed unto and to the use of A. and his heirs, in trust for B. and his heirs; here, although A. is *in* by the common law, the first use declared being

(*q*) *In re Row*, L. R., 17 Eq. 300; *In re Wood's Settled Estates*, L. R., 20 Eq. 372.

(*r*) See *Re Wason*, LL.J., 10 Jur., N. S. 1011.

(*s*) *Re Broadwood*, L. R., 1 Ch. D. 438.

(*t*) Lectures on the Seisin of the Freehold, pp. 165, 185.

a use to himself, yet the trust for B. and his heirs, being a trust upon a use, is one which the statute will not execute; and B. accordingly does not become seised at law of any estate, but he becomes entitled in equity to an estate in fee simple in the lands conveyed (u). Equitable estates tail are, as we have seen, only to be barred by a deed enrolled in the Chancery Division of the High Court; but with regard to all other estates of an equitable kind, the Court of Chancery has not followed the law in the strictness with which the conveyance of land is dealt with at law. An equitable estate, other than an equitable estate tail, may be conveyed from one person to another by any instrument which shows an intention so to do. There must be a writing, for it is provided by the Statute of Frauds (x), that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of non effect. Provided (y) that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if that statute had not been made. And it is further enacted (z) that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of non effect. If, therefore, writing be used and the intent is clear, an equitable

Conveyance
of equitable
estate.

(u) *Doe d. Lloyd v. Passingham*,
6 B. & C. 305.

(x) Stat. 29 Car. II. c. 3, s. 7.

(y) Sect. 8.

(z) Sect. 9.

estate in lands may be conveyed from one person to the other without feoffment, livery of seisin, or even a deed of grant.

Word
"heirs" un-
necessary in
equity.

Equity, moreover, did not follow the law in the strictness with which the law required that estates of inheritance should only be conveyed by the use of the words "heirs" or "heirs of the body." In equity, if the intent is clear, an estate in fee simple will pass without the use of the word "heirs;" and an equitable estate tail may be created without the use of the words "heirs of the body" of the grantee.

Rules of
equity now to
prevail.

A rule in apparent contradiction to the maxim, that equity follows the law, has been established by the Supreme Court of Judicature Act, 1873 (a), which provides generally, that in all matters not thereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. It is very difficult to foresee what construction will be placed by the court upon this very general though important enactment. I suppose it was hardly intended to enact that an estate in fee simple shall now at law be conveyed to a man without the use of the word "heirs," or that an estate in tail may now be granted to a man without the use of the words "heirs of the body." I suppose that the section was intended to apply merely to cases in which a conflict between the rules of equity and the rules of law occurs with reference to the particular matter under consideration. I confess I look forward with some curiosity to see how this provision will be interpreted by the courts.

(a) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

In some respects the doctrines of law cannot be followed out in all their consequences by the courts of equity. The rules of *tenure* which affect legal estates, cannot, from the nature of the case, affect estates which are merely equitable, or held by one person in trust for another. If the cestui que trust, or person in trust for whom the property is held, should die without heirs, the equitable interest which belonged to him will not *escheat* to any lord, for the cestui que trust was not the tenant of any lord. At law the cestui que trust is simply tenant at will to his trustees. It has been held that, in case of the failure of the heirs of the cestui que trust, the trustee, who is seised of the premises in law, may still continue to hold the estate discharged from any trust (*b*). So that in this case he will become entitled for his own benefit.

Tenure.

No escheat of equitable estate.

Cestui que trust is tenant at will.

The descent of trust estates under the old law was governed by rules analogous to those which governed the descent of legal estates under the same law. The seisin of the trustee was considered to be in equity the actual seisin of his cestui que trust (*c*). When property was in mortgage, and the mortgagee was in possession, it was thought that the mortgagor, who had then only an equitable estate in the lands called an *equity of redemption*, not being in possession, was not actually seised in equity of the lands so as to cause such equity of redemption to descend to his own heir, rather than to the heir of the person last actually seised (*d*). But if, as is usually the case, the mortgagee was not in possession, but the mortgagor was in receipt of the rents and profits, here he had an equitable seisin sufficient to make him the stock of descent (*e*). The Act to amend the law

Descent of trust estate.

When mortgagee in possession.

When mortgagee not in possession.

(*b*) *Burgess v. Wheate*, 1 Sir Wm. Black. 123.

(*c*) *Parker v. Carter*, 4 Hare, 400.

(*d*) *Penwill v. Lushcombe*, Mosley's

Reports temp. King, 72; 2 Jac. & W. 201.

(*e*) *Casburne v. Inglis*, 2 Jac. & W. 194.

of inheritance (*f*), to which I adverted in former Lectures (*g*), applies equally to the descent of trust estates as to the descent of estates at law.

Legal estate
in trustees
preserves
equitable
contingent
remainders.

The rule that, in a settlement of real estate, a continuous seisin of the freehold must be provided for, so that any break in such seisin was fatal at law to any contingent remainder which could not come into possession the very moment the particular estate determined, was not followed by the courts of equity. The legal estate vested in the trustees was considered sufficient to preserve all equitable contingent remainders, although an interval might elapse between the death of the equitable tenant for life, and the time when the equitable remainder should become an estate in possession. Of this we had an example in the case of *Hopkins v. Hopkins* (*h*), to which I referred in a former Lecture.

Resulting
trusts.

You will observe that the Statute of Frauds excepts *resulting trusts* from the enactment requiring that every trust should be created by writing. I have already spoken of resulting uses under the Statute of Uses (*i*). Resulting trusts are of a similar nature. If a man conveys real estates unto and to the use of trustees and their heirs, so as to vest the whole legal estate in them, upon certain trusts which do not exhaust the whole beneficial interest, as, for example, in trust for A. for his life, without saying more; here the trust of the estate results to the grantor, in remainder expectant on the decease of A.; and, after A.'s death, the trustees will hold the lands in trust for the grantor and his heirs. The trust which results to the grantor is considered to be part of his old estate, in the same way as a resulting use executed by the Statute of Uses forms part of the old estate. If

Resulting
trust part of
old estate.

(*f*) Stat. 3 & 4 Will. IV. c. 106.

(*h*) Cas. temp. Talbot, 44; 1

(*g*) Lectures on the Seisin of
the Freehold, pp. 70—98.

Atk. 581; *ante*, p. 24.

(*i*) *Ante*, pp. 17—19.

the conveyance had been made to trustees and their heirs, to the use of A. for life, without more; in this case, we have seen (*k*) that the use undisposed of by the deed will result to the grantor and his heirs; giving him a legal estate in remainder expectant on the decease of A. So a resulting trust gives to the grantor an equitable estate of a similar kind.

In making a settlement of lands, one of the first and Settlements. most important matters to be considered is, whether the legal estate in fee simple in the lands shall be vested in the trustees of the settlement, in trust for the persons intended to be benefited; or, whether the Statute of Uses shall be rendered available, so as to give a legal estate and interest to each party entitled, according to the order in which he is to come into possession, and to give to the trustees powers of sale, exchange and other powers which, as you have seen (*l*), may be created under that statute, irrespective of legal ownership. There are advantages and disadvantages in both Legal estate in trustees. methods. I may say, generally, that, in small settlements, especially where a sale is contemplated, it is thought better and is more usual to vest the whole legal estate in the lands in the trustees of the settlement. In large settlements, especially where the property is intended to be entailed upon the eldest son, it is usual Not in trustees. and thought more convenient to resort to the Statute of Uses, giving to the parties successively to be entitled legal estates in the land, and relegating the powers which the trustees are to possess to the doctrine of powers under the Statute of Uses. If the whole legal estate is vested in the trustees, there is no doubt this inconvenience, that, when the settlement comes to an end, it will be necessary that the trustees should execute a conveyance of the legal estate so vested in them to the person or

(*k*) *Ante*, p. 18.

(*l*) *Ante*, pp. 36, 37.

persons, whoever they may be, who, at the conclusion of the settlement, are in equity entitled to the property. But, as a set-off against this, there is no occasion for the same nicety in the construction of the powers which the trustees are to possess. If trustees have no other powers than such as are expressly given to them by virtue of the Statute of Uses, and independently of any ownership, it is necessary that the powers should be very carefully constructed; as every event must be provided for, and the trustees can do nothing but what they are expressly authorized to do. But, if you vest the whole legal estate in fee simple in the trustees, you at once give them at law, by virtue of their ownership, all the powers which an owner in fee simple can possess over land. They have power to convey. They have power to lease. All, therefore, that is wanted is merely to restrict them in the exercise of the powers which the law gave them by virtue of their ownership. For instance, they are not to sell without the consent, say of the husband and wife, or of the survivor, in the case of a marriage settlement. So, without such consent, it may be stipulated that they may not grant any lease; and the term and length of the lease they may grant may be and should be stipulated for in the settlement. Whereas, if the settlement is so framed that the beneficiaries are to take the legal estate, then, when the settlement comes to an end, the last beneficiary having the legal estate, there will be no occasion for the trustees of the settlement to make any conveyance to him; for in truth they will have nothing to convey. Again, if the tenant for life under the settlement has the legal estate vested in him, he may deal with the tenants of the estate himself, without troubling the trustees, who, if the legal estate be vested in them, are the persons who must eject refractory tenants, and take all legal proceedings with respect to the property. The possession by the trustees of the legal estate, does not, however,

necessarily carry with it the right of management of the lands, to the exclusion of the *cestui que trust* for life; for the court will often give him the management, unless it appear to be the intention of the author of the trust to vest it solely in the trustees (*m*). Management.

I hope in my next Lecture to finish so much of the present subject as directly relates to the explanation of the Statute of Uses.

(*m*) *Tidd v. Lister*, 5 Mad. 429.

LECTURE V.

Rent-charges
by way of
use.

THERE are two sections in the Statute of Uses ^(a) of which frequent use is still made in conveyancing; and they are the 4th and 5th sections, which relate to rent-charges created by way of use. These sections recite that where divers persons stand seised of any lands, tenements or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them and to his or their heirs, one annual rent of 10*l.*, or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited, and made thereof; and they enact that in every such case the same persons, their heirs and assigns, that have such use and interest to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent, to be had, made or paid according to the very trust and intent thereof; and that all and every such person and persons as have or hereafter shall have any title, use and interest in or to any such rent or profit, shall lawfully distrain for non-

(a) 27 Hen. VIII. c. 10.

ion of



payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, and have all other suits, entries and remedies for such rents as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent.

This is a provision that is very frequently made use of. I mentioned in a former Lecture (b) that since the Statute of *Quia emptores* (c), it is not lawful for any person to convey land to be holden of himself in fee simple. Every conveyance of freehold land to a man and his heirs must be made to hold of the same chief lord of the fee as the person who conveys the land himself held before such conveyance. But in some parts of England, particularly in the northern counties, it is very usual to sell and convey lands in fee simple, in consideration of their being subject to a rent-charge to be issuing out of it, and to be granted to the person who conveys the land, his heirs and assigns, for ever. So that, instead of being seised in fee of the land, he, after the conveyance, becomes seised in fee of a rent-charge issuing out of the land. This is usually done when the land is intended to be improved by building on it; and it is now constantly effected by means of the 4th and 5th sections of the Statute of Uses. A., being seised in fee, grants the lands in question to B. and his heirs, to the use and intent that he, A., his heirs and assigns, may henceforth receive, out of the rents and profits of the premises, a yearly rent-charge of so many pounds; and there usually follows a further use and intent that if the rent-charge be unpaid for so

Sale of lands in consideration of rent-charge.

(b) Lectures on the Seisin of the Freehold, pp. 21, 22. (c) Stat. 18 Edw. I. c. 1.

many days, it shall be lawful for A., his heirs and assigns, to enter upon the premises and distrain for the rent; but this is unnecessary, for, as you see, the statute itself gives a power of distress. There is generally a further use and intent that if the rent be behind for so many more days, it shall be lawful for A., his heirs and assigns, to enter and take possession of the premises, and to receive the rents and profits for his and their own benefit, until he and they shall therewith or otherwise be fully satisfied the rent-charge and all arrears thereof, and also all arrears which shall grow due during the time that he or they shall, by virtue of such entry, be in possession of the premises, together with all costs and expenses occasioned by the non-payment or recovery of the same or in relation thereto; such possession when taken to be without impeachment of waste. All these uses are, by the statute, turned into legal estates and interests. A. has a legal rent-charge to himself in fee simple issuing out of the premises; he has also a legal power to distrain in case of non-payment within the time fixed, and also a legal power of entry and enjoyment of the rents, in case the rent-charge is unpaid for the further time specified, until all arrears and expenses shall have been paid up. Subject to the rent-charge, and to the powers and remedies for securing payment thereof, the lands are then limited to the use of B., his heirs and assigns, or to any other uses which B. may prefer; and B. then becomes, by virtue of the first section of the Statute of Uses, seised in fee of the lands subject to the rent-charge, and to the remedies for securing the same.

Jointures.

The 4th and 5th sections of the statute are also constantly used in settlements for the purpose of securing a jointure for the intended wife, or any other rent-charge which it may be desired to give to any other person for life or otherwise. The rent-charge, when

created by virtue of the statute, becomes a legal rent-charge, and may itself be granted to one and his heirs, to the use of another and his heirs, or for any other estate. For a rent-charge is a hereditament; and in that case it falls within the first section of the Statute of Uses, which, as you remember, provides, that where any person is seised of any rents or other hereditaments (*d*), to the use, confidence or trust of any other person or persons, they that have the use, confidence or trust, shall be deemed and adjudged in lawful seisin and possession of and in the same rents and hereditaments, of and in such like estates as they had in the use, trust or confidence of the same.

The case of *Heelis v. Blain* (*e*), to which I referred in a former Lecture (*f*), affords an example of the use of both sections of the statute. You will see, on referring to the report of that case, that the rent-charge of 50*l.* which was then in question, was created by indentures of lease and release, dated respectively the 9th and 10th of June, 1839, whereby certain land was granted, bargained, sold and released by John Robinson and Stephen Heelis, to John Spencer and his heirs, to the use, intent and purpose that the said John Robinson and his assigns during his life, and, after the determination of that estate by any means in his lifetime, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should, yearly and every year for ever thereafter, have, receive and take from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of 50*l.*, by half-yearly payments on the 24th of June and 25th of December; and to further uses limiting to John Robinson,

*Heelis v.
Blain.*

(*d*) Lectures on the Seisin of the Freehold, p. 139.

(*e*) 18 C. B., N. S. 90.

(*f*) *Ante*, p. 14.

his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and preception of profits for securing the said yearly rent; and, subject to the said yearly rent of 50%, and to the powers and remedies for the recovery thereof, to uses to bar dower in favour of John Spencer, his heirs and assigns for ever.

The uses to bar dower I will endeavour to explain in a future Lecture (g). Here you see that, by the operation of the 4th and 5th sections of the Statute of Uses, John Robinson had a rent-charge of 50% for his life vested in him; Stephen Heelis had a vested estate in the same rent-charge during the life of John Robinson, because, if John Robinson's estate in the rent-charge were to cease at any time during his life, then Stephen Heelis or his heirs would be ready to come in and receive the rent-charge during the residue of the life of John Robinson (h); and, subject to this estate vested in Stephen Heelis, John Robinson became seised in fee of the rent-charge, to him, his heirs and assigns for ever. Then, by an indenture of the 3rd November, 1862, John Robinson granted and released the said rent-charge of 50%, and all his estate therein, with the said powers and remedies for recovering the same, unto and to the use of the said Stephen Heelis, his heirs and assigns for ever. Now this indenture clearly had an operation simply by means of the common law, and not by virtue of the Statute of Uses. For you will remember that, if the use is limited to the same person to whom the hereditaments are conveyed, he is *in* simply by the common law and not under the statute (i). The life estate which Stephen Heelis had under the deeds of 9th and 10th of June, 1839, for the life of John Robinson, became merged in the estate in fee in the rent-

(g) See *post*, Lecture VI.

(i) *Ante*, p. 4.

(h) Lectures on the Seisin of the Freehold, p. 189.

charge which was granted to him by this deed; and the effect of the deed, therefore, was, that Stephen Heelis became seised in fee of the rent-charge, to him, his heirs and assigns. Then by a deed, which I mentioned when I referred to this case before (*k*), dated the 27th of January, 1864, and made between the said Stephen Heelis of the first part, John Heelis, his son, of the second part, and the said Stephen Heelis, and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis, four other sons of the said Stephen Heelis, of the third part, Stephen Heelis, in consideration of the natural love and affection which he had for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted the said rent of 50%, with the powers and remedies for the recovery thereof, to John Heelis and his heirs, to hold unto John Heelis and his heirs, to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis and Edward Heelis respectively, and their respective heirs and assigns equally in undivided sixth shares as tenants in common. Under this grant Stephen Heelis, the grantor, became, by virtue of the Statute of Uses, seised of a sixth part of the rent-charge, instead of being, as before, seised of the whole rent-charge; and all the other parties became, by virtue of the Statute of Uses, seised, each of an undivided sixth part in the rent-charge, as I mentioned in a former Lecture (*l*). I make no apology for reverting to this subject, because you will see, on consulting the case, that a confusion appears to have been made between the 1st and the 4th and 5th sections of the statute, when the case came before the revising barrister. The case turned upon the 1st section of the statute, and not on the 4th and 5th sections. These sections, the 4th and 5th, had already discharged their

(*k*) *Anto*, p. 14.

(*l*) *Anto*, p. 14.

duty when the rent-charge was created by the conveyance by lease and release of the 9th and 10th of June, 1839. These deeds created the rent-charge; the deed of the 3rd November, 1862, granted the rent-charge to Stephen Heelis in fee; and the subsequent indenture of 27th of January, 1864, called into operation the 1st section of the Statute of Uses, and, by its means, split up the rent-charge into six shares, holden by six different persons as tenants in common in fee.

Examples of
use of Statute
of Uses.

The right understanding of the Statute of Uses is so important that I think I cannot do better than devote a portion of the present Lecture to a few examples of the manner in which this statute is constantly used in conveyancing. Suppose that A. and B. are seised of lands in fee simple as joint tenants, upon certain trusts, as upon trust for sale, and to distribute the proceeds of the sale amongst other persons, or upon trust for securing sums of money to different people, or upon trust to pay over the rents and profits to a married woman for her separate use, or upon any other trust whatsoever; and B. wishes to resign the trust; and the

Appointment
of a new
trustee.

person or persons who have power to appoint a new trustee have appointed C. as a new trustee in his place. The problem then is, A. and B. being seised as joint tenants in fee of the lands in question, how these lands

Vesting lands
in new trustee
jointly with
old trustee.

shall become vested for the future in A. and C. as joint tenants in fee upon the same trusts. Of course it might be done by A. and B. granting the lands to a third person X. in fee, and then by X. regranteeing the land to A. and C., their heirs and assigns. But the Statute of Uses enables the conveyance to be effected by one deed instead of two. Let A. and B. convey the lands to C. and his heirs. This gives C. an estate in fee simple; but let it be conveyed to him and his heirs, to the use of A. and C., their heirs and assigns for ever. Here the statute at once operates, takes away

the seisin of C. and vests it in A. and C. jointly, for the same estate as they have in the use. They have an estate in fee simple as joint tenants in the use; and the statute gives them the same estate in the lands themselves.

Here is another example. A., a person seised in fee, wishes to vest his lands in trustees, and to make himself one of them. The way to effect this by virtue of the Statute of Uses is as follows:—Let A. grant the lands to the other trustees and their heirs, to the use of himself and the other trustees, their heirs and assigns as joint tenants, upon the trusts upon which he wishes that they should hold. Here the statute gives to A. and to his co-trustees the same estate as they had in the use, that is, an estate in joint tenancy in fee; and the trusts declared of the lands vested in them are a use upon a use, and create no further legal estate (*m*); so that A. and his fellows are jointly seised in fee upon the trusts which he wishes to create.

Another example.
Land vested in grantor jointly with others.

So, if a father wishes to settle his land upon himself for his life, and after his own decease upon his eldest son in fee, and also, in the meantime, to give to the son an annuity for his maintenance, he can most readily effect his intention by the means of the Statute of Uses. Let him grant the lands to the son and his heirs: this gives the son an estate in fee simple. Then let him attach uses on this estate: these uses the Statute of Uses will turn into estates in possession. The grant is made to the son and his heirs, to the use and intent that the son and his assigns shall, during the joint lives of himself and his father, receive, out of the rents and profits of the lands, a yearly rent-charge of, say 100%, payable quarterly, with powers of distress and entry for

Settlement by a father on himself for life with rent-charge and remainder to his son.

(*m*) Lectures on the Seisin of the Freehold, p. 194.

securing the same. This use, under the 4th and 5th sections of the statute, gives the son a legal rent-charge of 100*l.* per year during the joint lives of himself and his father. But, subject to this rent-charge, the father wishes to keep the estate during his life. This intention if effected by the second limitation of use, which is this:—subject to the rent-charge and to the powers and remedies for securing payment thereof, to the use of the father and his assigns during his life; and, if he wishes to have power to commit waste, then to the use of himself and his assigns during his life *without impeachment of waste*. This enables the father to hold the estate during his life; then, to complete the transaction, a further use is limited, after the decease of the father, namely, to the use of the son, his heirs and assigns for ever. This vests in the son an estate in fee simple in remainder expectant on the decease of his father.

Grant unto
and to the use
of trustees
and their
heirs.

Again, if A. wishes to grant his lands to certain trustees to be held by them upon certain trusts, he grants the lands in question to the trustees and their heirs, to hold the same unto the trustees and their heirs, to the use of them, their heirs and assigns. This, as we have seen (*n*), puts the trustees *in* by the common law, and not by virtue of the Statute of Uses. But the insertion of the words “to the use of them, their heirs and assigns” has this effect;—it makes any subsequent use or trust limited in favour of any other person *a use upon a use*, which, as we have seen (*o*), is not executed or made into an estate by the Statute of Uses. It follows, therefore, that, after the execution of a conveyance of this sort, giving the lands unto the trustees and their heirs, to the use of them and their heirs, they take the legal estate in fee simple, and none of the beneficiaries has any legal estate given to him by the opera-

(*n*) *Anto*, p. 4.

(*o*) Lectures on the Seisin of the Freehold, p. 194; *anto*, pp. 53, 54.

tion of the Statute of Uses. In fact in this case the operation of the statute is excluded. This is an example, not of the way in which the statute may be made use of, but of the way in which the statute may be prevented from having any operation.

Again, suppose a married man, being distrustful of his own judgment, should wish to give his wife a joint power with himself of disposing of his own lands, he could not, at the common law, have effected his object. But the Statute of Uses enables him to do so. Let him convey the lands to A. and his heirs (A. being any person no matter who), to such uses as he the grantor and his wife shall by deed jointly appoint, and in default of any appointment and subject thereto to any uses he may think fit. Here A. the grantee takes merely an instantaneous seisin; the uses limited in default of appointment become, by virtue of the Statute of Uses, vested estates. But the grantor and his wife, having now a joint power of appointment by deed, may at any time, by the exercise of their power, divest these estates either totally or partially, by appointing the use of the lands to a third person in fee simple or for any less estate.

Grant by husband giving his wife joint power with himself.

Again, if a father be tenant for life of freehold lands, with remainder to his eldest son and the heirs or heirs male of the body of such eldest son, here, when the eldest son comes of age, he and his father together can do what they please with the property. The son, with the consent of his father as protector of the settlement, can bar his estate tail and all remainders over by a deed of grant to be enrolled in the Chancery Division of the High Court within six calendar months (*p*). Suppose, then, that both father and son are desirous that the

Father tenant for life and son tenant in tail in remainder can acquire a joint power over the lands and settle them subject thereto.

estate should be continued in the family, and that for that purpose the son should be content with an estate for life only, in remainder expectant on the decease of his father, with remainder to *his* eldest son, as yet unborn, and the heirs male of his body, and so on; and suppose that, whilst having this object in view, they were also desirous they should yet both together, but not one alone, have power to alter or defeat the settlement at their pleasure, should circumstances render such a course desirable; they may readily effect all this by virtue of the Statute of Uses. Let the father grant his life estate, and let the son, with the consent of his father as protector of the settlement, grant his remainder in tail to A. (no matter whom) and his heirs, to such uses as the father and son shall jointly by deed appoint, and in default of and subject to any such appointment, to the use of the father for life, with remainder to the use of the son for life, with remainder to the use of *his* eldest son and the heirs male of his body, and so on to the use of his second and other sons successively in tail male. Let the deed be at once enrolled in the Chancery Division of the High Court and the thing is done. The father has a life estate, the son has the next life estate, his first son has, when born, an estate in tail male; but the father and son can together defeat the whole by appointing, under their joint power, the use of the lands in some other way.

Jointure.

I now proceed to call your attention to further sections of the Statute of Uses, which relate to the *jointure* of a married woman; and it may serve as an introduction to the next Lecture, in which I hope to treat of the dower of a married woman, which one may say generally is a right to enjoy, during her life, one third part of all the real estates of her husband, to which any issue that she might have had by him could have been heir. Before the Statute of Uses, the use of

land was not considered to be liable either to the dower of the widow (*q*), or to the curtesy of the husband of the cestui que use, or person for whose use the land was held (*r*). When the Statute of Uses transferred the legal estate to those who were entitled to the use of lands, it followed that all women then married would have become dowable of all lands holden to the use of their husbands, and would also have been entitled to any particular lands that might have been settled on them by way of jointure after the decease of their husbands. This of course would have been an injustice; and the 6th section of the Statute of Uses accordingly provides, that whereas divers persons have purchased or have estate made and conveyed of and in divers lands, tenements and hereditaments, unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for the term of their lives, or for term of life of the said wife, and where any such estate or purchase of any lands, tenements or hereditaments hath been, or hereafter shall be, made to any husband and to his wife in manner and form expressed, or to any other person or persons, and to their heirs and assigns to the use and behoof of the said husband and wife, or to the use of the wife as is before rehearsed, for the jointure of the wife; that then in every such case, every woman married having such jointure, made or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, tenements or hereditaments that at any time were her said husband's, by whom she hath any such jointure, nor shall demand nor claim her dower of and against them that have the lands and inheritance of her said husband; but if she have no such jointure, then

No dower nor
curtesy of
ancient use.

Statute of
Uses, sect. 6.

Woman
having
jointure not
to have
dower.

(*q*) Perkins' Profitable Book,
s. 349.

(*r*) *Ibid.* s. 463; 1 Rep. 123 b.;
Sanders on Uses, 66, 4th ed., 66,
66, 5th ed.

In case wife
is evicted
from her
jointure.

Jointure after
marriage.

Wife may
then refuse
jointure and
claim dower.

she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm. Provided (s) that if any such woman be lawfully expelled or evicted from her jointure or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto. Provided also (t) that if any wife have, or hereafter shall have, any manors, lands, tenements or hereditaments unto her given and assured *after marriage*, for term of her life, or otherwise in jointure, except the same assurance be to her made by Act of Parliament, and the said wife, after that, fortune to outlive her said husband, in whose time the said jointure was made or assured unto her, that then the same wife, so overliving, shall and may, at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed or assured, during the coverture, for term of her life or otherwise in jointure, except the same assurance be to her made by Act of Parliament as is afore-said, and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements and hereditaments as her husband was and stood seised of any state of inheritance at any time during the coverture; any thing contained in the Act to the contrary thereof notwithstanding.

Requisites for
legal jointure.

The sixth section of the statute, being in contradiction of the common law, has always been construed strictly, and no estate limited to a woman is deemed a good jointure and bar to dower under this Act, unless it be attended with the following circumstances. 1st. It

(s) Sect. 7.

(t) Sect. 9.

must commence to take effect in possession immediately on the death of the husband, or otherwise it will not be so beneficial as dower, which commences immediately on the husband's decease. 2ndly. It must be for the life of the wife at least, or for some greater estate. 3rdly. The estate must be to the wife herself, and not to any other person in trust for her. This, however, will not prevent the jointure from being a good equitable jointure and a bar to dower in equity, though at law it would seem to be otherwise. 4thly. The jointure must be in satisfaction of the whole of the wife's dower, and not in satisfaction of a part of it only. 5thly. The estate limited to the wife must be *expressed* to be in satisfaction of her whole dower, or it must appear from the contents of the instrument that such was intended to be the case. And, 6thly, the jointure must be made before her marriage; for, as we have seen (*u*), the ninth section of the statute expressly provides that, if it be made after marriage, unless it be by Act of Parliament, then the wife, if she survive her husband, may refuse the jointure, and may claim her dower; but if she once accepts the jointure, then she cannot afterwards alter her mind. The Act for the amendment of the law relating to dower (*x*), by placing the wife's dower in the power of her husband, has rendered the law of jointures of less importance than it was before.

Law of jointures now less important.

Before proceeding to the subject of Settlements, of which marriage settlements are the most frequent and the most important, it will be desirable to explain to you the rights and interests which, independently of settlements, a wife has in the lands of her husband, and the husband has in the lands of the wife, or in other words the dower of the wife and the curtesy of the husband. I propose to devote the next Lecture to the consideration of the subject of *Dower*.

(*u*) *Ants*, p. 78.

(*x*) Stat. 3 & 4 Will. IV. c. 105.

LECTURE VI.

Dower.

BEFORE considering the Settlements usually made on the occasion of marriage, it is desirable that you should understand the estates and interests which the law gives, independently of settlement, first to the wife in the lands of her husband, and secondly to the husband in the lands of his wife. The right which the law gives to a woman on her marriage is called her right of *dower*. This right, of which anciently the husband was unable to deprive his wife without her consent, was, by an Act passed in the 3rd and 4th years of the reign of King William IV. (a) enlarged in some respects, but diminished in one most important respect, namely this,—that by this Act it rests entirely in the pleasure of the husband whether his wife shall have dower out of his lands or not. How far this feature of the Act is an amendment of the law may perhaps be questioned. At any rate it has rendered it more than ever desirable that, on the marriage of a woman with a man entitled to landed property, a settlement on the wife by way of jointure should be stipulated for by her friends.

Littleton's
definition of
dower.

Let us first consider the law of dower as it stood before the Act was passed to amend it. Littleton tells us (b) that there were in his time five kinds of dower, viz., dower by the common law, dower by the custom, dower *ad ostium ecclesie*, dower *ex assensu patris*, and dower *de la plus belle*. “Tenant in dower,” says Littleton (c), “is where a man is seised of certain lands or

(a) Stat. 3 & 4 Will. IV. c. 105.

(c) Sect. 36.

(b) Sect. 51.

tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife and dieth, the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty, by metes and bounds, for the term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as," he adds by way of a precaution, which in these days is scarcely necessary "so as she be past the age of *nine* years at the time of the death of her husband (for she must be above nine years old at the time of the decease of her husband), otherwise she shall not be endowed." This is dower by the common law. It was a right of which the husband could not deprive his wife either by alienation by deed or will, or by running into debt. Her claim was paramount the rights both of his alienees and of his creditors.

Dower paramount both alienees and creditors of husband.
Seisin.

You will observe, first, that the man must have been seised. This subject affords a further illustration of the subject of my former course of Lectures (*d*), as it shows the importance attached by the ancient law to the *seisin* of the freehold. If a man was not seised, his wife had no right to dower. Now you will remember that if a man had vested in him a reversion or remainder in fee simple, expectant on the determination of a prior estate for life, or of a prior estate tail, he was not seised. The seisin was in the prior tenant for life or tenant in tail, and, being in him, could not at the same time be in the person entitled to the remainder or reversion expectant on his estate. A person entitled to such a reversion or remainder held it free from any right of dower in his wife, so long as the estate continued a mere reversion or remainder; but the moment his estate became an estate

No dower of a reversion or remainder expectant on an estate of freehold.

(*d*) Lectures on the Seisin of the Freehold.

in possession, his wife became entitled to dower by virtue of the *seisin* of her husband.

Seisin in law
sufficient for
dower.

If the husband was seised, it was not material whether his seisin were a seisin in law merely, or a seisin in deed. If, at any time, though but for an instant, during the coverture, the husband was seised of land, whether in law or in deed, his wife was entitled to her dower. This is explained by Mr. Watkins in his Essay on the Law of Descents (e). "If the heir has such right, that is, a right to the lands, together with a seisin in law, his widow may claim her dower, though he die before entry, and though that seisin in law abide in him but for a single moment. As where lands descend to an heir, who is married at the time of the descent cast, and a stranger *abates* on the death of the ancestor; and, during the possession of the stranger, the heir dies, his widow shall be endowed. For, as the law, immediately on the death of the ancestor, casts the estate on the heir, and as the stranger cannot abate till *after* the death of the ancestor (for had he entered before, he would not have been the abator of the heir but the disseisor of the ancestor), the seisin, in contemplation of law, is in such heir before the abatement of the stranger. For, supposing that the stranger had entered the very instant that the ancestor died, yet, as the possession was necessarily vacant before he could have *abated*, the possession during such vacancy was presumed by the law to have been in the heir; and the law frequently permits an instant to be cleft asunder, for it tells us that in things of an instant there is a priority of time, and the one shall be said to precede the other, although both shall be said to happen at one instant; for every instant, says the law, contains the end of one time and the commencement of another. But we must not

Abatement.

forget," adds Mr. Watkins, "that, though it thus cleaves an instant into two parts, it gravely informs us that it does not carry its pretensions so far as to be able to carve it into three." "No case can be put," says Lord Coke, in *Fitz William's case* (*f*), "that by any construction three times may be admitted in one instant." "But if the heir had not been married at the time of the descent cast, and a stranger had abated, and afterwards the heir had married and died before a subsequent seisin, his wife should not be endowed. For, by the entry of the stranger, his seisin in law was rebutted; and therefore as he had no seisin either in deed or law—and seised he must be, says Sir Edward Coke, either the one way or the other during the coverture—he had only a right remaining in him. And as a seisin, either in deed or in law, was thus essential to give title of dower to the widow, and as the heir had now neither of those seisins, by consequence his widow could not be dowable." . . . "So had the heir entered on the death of his ancestor and gained an actual seisin, and then, during his celibacy, had been disseised, and after such disseisin had married and died, before a subsequent recovery of seisin, his widow should not be endowed. But had he in the first case been married at the time of the descent, and so had a seisin in law during the coverture, or had he had an actual seisin after marriage, and then been disseised, or had aliened his lands, his widow would be certainly dowable."

If heir married during an abatement his wife not dowable.

The instantaneous seisin which a grantee to uses takes when the Statute of Uses annexes his estate to the uses declared, is not sufficient to entitle his widow to dower (*g*). And when a man is seised of lands not beneficially but merely as a trustee, equity will prevent his widow from obtaining any dower out of such lands.

Grantee to uses.

Trustee.

(*f*) 6 Rep. 33 a.

(*g*) Co. Litt. 31 b; 2 Bl. Com. 131.

Seisin in fee
or in tail.

The first requisite, therefore, to entitle a wife to dower, was that her husband must have been seised either in law or in deed. It was also necessary that he should be seised in fee simple, fee tail, or as heir in special tail. This is explained by Littleton in another section (*h*), in which he says, "Also in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail. Yet if the husband die without issue the same wife shall be endowed of the same tenements, because the issue which she by possibility might have had by the same husband might have inherited the same tenements. But, if the wife dieth, living her husband, and after the husband takes another wife and dieth, his second wife shall not be endowed in this case, for the reason aforesaid." The reason being, as you see, that in this case, no issue which the second wife could have had, could by possibility inherit the lands, because they were given to the husband and to the heirs which he should beget of the body of his former wife, and not of the body of the second wife; who therefore could have no claim to dower in the lands.

Seisin at any
time during
the coverture.

Again, the wife had a right to be endowed of the third part of such lands and tenements as were her husband's *at any time* during the coverture. We have

seen (i) that if the husband was seised in law of the lands, though but for an instant, or rather, in strictness at law, but for a moiety of an instant, still the wife would have a right to her dower. As lands became more frequently aliened, this right of the wife became very inconvenient; for it was impossible for the husband to sell or mortgage his lands without first procuring his wife's concurrence. Without her concurrence he could only sell or mortgage subject to his wife's right to be endowed for her life of a third part of the lands immediately after her husband's decease. So inconvenient a right was, of course, a great hindrance to the alienation of the lands; and if the wife should concur, still the common law provided no means less expensive and troublesome than the levying of a *fine*, by which the wife's right to dower out of the lands could effectually be barred. It was not enough that she signed, sealed and delivered the deed of feoffment or other conveyance. Without a *fine* levied by her and her husband, in which fine, as you may remember, she was separately examined (k), her right to dower, or any other right she might have in the lands, could not be effectually conveyed or released. The Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance (l), now enables a married woman to convey or release any interest which she may have in freehold lands by any deed of conveyance executed by her with the concurrence of her husband, and *acknowledged* by her to be her own act and deed before a judge or commissioners appointed for that purpose (m). But this Act was not passed until the same session of Parliament as that in which the Act was passed for the amendment of the law relating to dower (n); and this Act, as

A fine.

Deed acknowledged.

(i) *Ante*, p. 82.

(k) Lectures on the Seisin of the Freehold, p. 108.

(l) Stat. 3 & 4 Will. IV. c. 74.

(m) Lectures on the Seisin of the Freehold, pp. 111—114.

(n) Stat. 3 & 4 Will. IV. c. 105.

Wife concurring in mortgage.

Her dower totally extinguished.

we shall see, now puts the wife's dower entirely into the power of her husband. The Act to amend the law of dower only extends to women married after the 1st of January, 1834. When a man, married on or before that date, wished to sell or mortgage land of which he was seised in fee, he was obliged to procure his wife to release her dower either by fine, before fines were abolished, or by her acknowledging the deed of conveyance or mortgage. When the wife concurred in a mortgage deed of her husband's lands, it was a very general opinion that, subject only to the mortgage debt and interest, her right to dower would still be considered as subsisting in equity, the intention on her part being not to give up her dower altogether, but only so far as to let in the mortgage in priority to her right. But it has recently been decided that in this case the dower of the wife is totally extinguished in equity as well as at law (o).

Uses to bar dower.

Before the Dower Act, when a man purchased land, he very naturally wished to dispense with the necessity of his wife's concurrence in levying a fine to bar her dower, in case he should wish to deal with the land by mortgage or sale. It was accordingly usual in all purchase deeds for the purchaser to avail himself of the Statute of Uses, and to have the conveyance so framed as that his wife should not be entitled to dower out of the lands, but that the husband should be able to dispose of them without his wife's concurrence. This was effected by what were called *uses to bar dower*. The purchased lands were conveyed—generally by lease and release as I have before explained (p)—to the purchaser and his heirs, to such uses, upon such trusts, and generally in such manner as the purchaser should by deed appoint, and in default of and subject to any such

(o) *Dawson v. Bank of Whitehaven*, L. R., 6 Ch. D. 218.

(p) *Lectures on the Seisin of the Freehold*, pp. 145, 147.

appointment, and so far as the same should not extend, to the use of the purchaser and his assigns during his life without impeachment of waste, and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of a trustee and his heirs during the life of the purchaser, in trust for him and his assigns, and after the decease of the purchaser, to the use of the purchaser, his heirs and assigns, for ever. The Statute of Uses transferred the estates limited in this manner by way of use into legal estates; and the consequence was, that the purchaser became, subject to the exercise of his power of appointment, seised of an estate for his own life. The trustee had vested in him an estate in remainder during the life of the purchaser, and in trust for him. The trust for the purchaser was a use upon a use, and so was not executed or turned into a legal estate by the Statute of Uses. The estate of the trustee was a *vested* estate, inserted between the life estate of the purchaser and the reversion in fee, which, by the last limitation, became vested in him (g). The consequence was, that it was impossible for the purchaser to be seised of the lands in question for an estate in fee simple in possession even for half an instant at any moment during his life. He was seised, it is true, but seised only of an estate for life. He was not seised in fee simple or fee tail. That of which he had the fee simple was a distinct estate, namely, the reversion expectant on the determination of his prior life estate; and this reversion was kept distinct and apart from his life estate by the intervening estate vested in the trustee during his life, and held in equity in trust for him. These uses, therefore, while they gave the husband the whole beneficial ownership, effectually barred his wife of any claim to dower out of the lands. The power of appointment also enabled the husband to convey the

Explanation
of uses to bar
dower.

Husband was
not seised in
fee or in tail.

Effect of
exercise of
the power of
appointment.

(g) Lectures on the Seisin of the Freehold, p. 189.

lands in any manner he pleased, without the concurrence of his trustee, in whom, as we have seen, subject to the husband's appointment, an estate was vested for the life of the husband. The power of appointment, when exercised, carried with it the use of the lands, according to the estates expressed in the deed by which the power of appointment was exercised (r). Thus the husband might by deed, in pursuance of his power, appoint the lands to X., his heirs and assigns. This was an appointment of the use of the land, the use having been limited to such persons and for such estates as the husband should appoint. But the Statute of Uses annexes the fee simple in actual possession to the use in fee simple. The result therefore is, that the husband, the purchaser, in exercise of his power of appointment, may appoint to the use of any purchaser from him in fee or otherwise; and the use carries the legal estate, so that the person in whose favour he has made the appointment takes exactly the same legal estate in the lands as he has in the use appointed to him under the power. And by the exercise of this power, the life estate which the appointor had in default of appointment, also the estate of the trustee during his life in trust for him, also his own reversion in fee simple, are displaced and put an end to. On the event of the exercise of the power, the use, and with it the estate, shifts away from those in whom it was previously vested, and vests in the appointee, according to the estate, which, by the exercise of the power, was limited to his use.

Issue unnecessary.

The widow is entitled to a third part of the lands, by metes and bounds, for the term of her life; whether she has had issue by her husband or not. It is sufficient if she might have had issue by him, who might have

(r) *Ante*, pp. 39, 40.

inherited the lands as his heir. In this respect dower differs from curtesy, as we shall hereafter see, in which case it is necessary that issue should be born. After her husband's death her dower must be assigned or set out by *metes and bounds*; and after it is so set out, she becomes *tenant in dower* of the lands assigned to her; and, by her endowment, she is considered to be *in* from her husband, and not from his heir or devisee, by whom the dower has been assigned to her. Her estate is said to be the continuance of the estate of her husband, so that, after she has entered into the lands assigned to her, or the seisin of the lands has been actually delivered to her by the sheriff, the heir can have no actual seisin of such third part. He has only a reversion therein, expectant on an estate of freehold, such estate of freehold being the widow's estate for her life in respect of her dower.

Metes and bounds.

Tenant in dower.

In from her husband.

Heir has only a reversion in lands set out for dower.

In some cases there is no necessity for any assignment of dower. If the husband held an undivided share of lands in fee simple or fee tail, as tenant in common with any other person, then, after the husband's decease, his widow is entitled to a third part of his share, whatever his share may have been. And as, in this case, her dower cannot be assigned by metes and bounds, she has, immediately after his death, a right to a third part of his share of the rents or profits, without any assignment being made to her. So, if the lands were let upon lease before the marriage to a tenant for a term of years, such tenant, though he has the possession, has not the seisin, but the husband is seised, subject to the term. In this case his wife is entitled to dower out of the lands; and her dower, in this case, consists of a third part of the rent payable by the tenant. If the land should have been let by the husband before the marriage to a tenant for a term of years, yielding no rent, then, during the continuance of the term, the wife is practically excluded from her dower. The husband is seised; for the posses-

Where assignment unnecessary.

Undivided share of lands.

Lands let on lease.

Term of years without rent.

sion of his tenant for years is his actual seisin (*s*). His wife, therefore, has a right to her dower, but it is with
Cesset executio. a *cesset executio* during the term. So long as the term lasts, she cannot be put into possession of anything. When the term is over, she has a right to dower during the remainder of her life. A long term of years without rent assigned to a trustee for the husband on his purchase of land, was a not unfrequent mode of practically excluding his wife from all dower out of such land.

Formerly no
dower of
equitable
estate.

D'Arcy v.
Blake.

I mentioned in the Lecture before last (*t*) that equity did not so far follow the law as to allow a widow dower out of a trust estate, or an estate in equity only and not at law. You will find a defence of the Courts of Equity for this proceeding in the judgment of Lord Redesdale in the case of *D'Arcy v. Blake* (*u*), cited by Lord Justice Knight Bruce in the case of *Smith v. Adams* (*x*). The substance of the defence is that if Courts of Equity had allowed a widow dower out of the equitable fee of her husband, it would have been very inconvenient to purchasers of landed property.

Joint
tenancy.

Broughton v.
Randall.

It was necessary that the husband should have been *solely* seised. If A. and B. are joint tenants in fee, and A. dies, the whole survives to B., and the wife of A. has no right to dower out of the lands. But if either of the joint tenants should, as he may, sever the joint tenancy and turn it into a tenancy in common, from that moment his wife would become entitled to dower out of the share so held in common. So if one joint tenant should die, the other would become solely seised, and his wife would accordingly become entitled to dower. Thus in the case of *Broughton v. Randall* (*y*), a father and son were joint tenants to them and the heirs

(*s*) Lectures on the Seisin of the Freehold, pp. 5, 54.

(*t*) *Ante*, p. 54.

(*u*) 2 Schoales & Lefroy, 387.

(*x*) 5 De Gex, M. & G. 719.

(*y*) Cro. Eliz. 502.

ASTON AND COATE.



One Thwart over



Two Thwart over



Three Thwart over



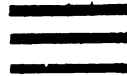
Four Thwart over



One in Right



Two in Right



Three in Right



*Two in Right
One at Head*



*Three in Right
One at Head*



The Priest



The Cranes Foot



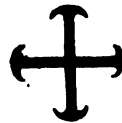
The Headless



The Bow.



The Cross



The Reel



The Peel

MARKS USED BY THE SIXTEENS.

1

of the son. They were both hanged in one cart, but because the son survived, as appeared, says the report, by his shaking his legs, his wife therefore demanded dower, and it was found in her favour.

The next kind of dower mentioned by Littleton is dower by the custom. By the custom of gavelkind the wife is entitled to one-half of the lands instead of a third only; but she has a right to it only so long as she remains a widow and chaste. By the customs of some towns or boroughs, she may have the whole of the lands during her life for her dower; and in that case she may enter immediately after the death of her husband, as, in that case, it is evident that no assignment is necessary. The widow's right in the case of copyholds depends entirely upon the custom of the manor. But, like dower under the old law, it is paramount the debts of the husband. In some few manors the right corresponds to the right of dower out of freeholds at the common law, and may be claimed in respect of lands of which the husband had the customary seisin *at any time* during coverture. But this is not ordinarily the case. In ordinary cases of copyholds, where the wife is entitled to any interest in the lands after the death of her husband, her right is confined to lands of which her husband had the customary seisin *at the time of his decease*. Her right in this respect is termed her *free bench*, and, as it does not usually attach until the decease of her husband, so it may be defeated by his devising the lands by his will. This point, which it is singular should have so long remained in doubt, was decided by the present Master of the Rolls in the case of *Lacey v. Hills* (a). It has been held that free bench remains unaffected by the Act for the amendment of the law relating to dower(a).

Dower by custom.

Gavelkind.

Dower of the whole.

Copyholds.

Free bench.

Lacey v. Hills.

(a) L. R., 19 Eq. 346.

(a) *Smith v. Adams*, 5 De Gex, M. & G. 712.

And equity does not allow a widow free bench out of an equitable estate in copyholds, any more than it allows dower out of an equitable estate in freeholds.

Dower *ad
ostium ecclesiæ.*

The next kind of dower which Littleton mentions is dower at the church door, *ad ostium ecclesiæ*. It had become quite obsolete when it was abolished by the Act to amend the law relating to dower (*b*). "It is," says Littleton (*c*), "where a man of full age, seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of her husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any."

Dower *ex
assensu patris.*

The fourth kind of dower mentioned by Littleton is dower by the consent of the father, *ex assensu patris*. "And this," says Littleton (*d*), "is where the father is seised of tenements in fee, and his son and heir apparent, when he is married, endoweth his wife, at the monastery or church door, of parcel of his father's lands or tenements, with the assent of his father, and assigns the quantity and parcels. In this case, after the death of the son, the wife shall enter into the same parcel without any assignment." This had become entirely obsolete when it also was abolished by the Act for the amendment of the law relating to dower (*e*).

Dower *de la
plus belle.*

The fifth kind of dower, dower *de la plus belle*, is also obsolete, but it is worth mentioning, as showing the

(*b*) Stat. 3 & 4 Will. IV. c. 105,
s. 13.
(*c*) Sect. 39.

(*d*) Sect. 40.
(*e*) Stat. 3 & 4 Will. IV. c. 105,
s. 13.

preference which the law in ancient times had to lands held by knight's service over those held in socage. If a man was seised of lands held by knight's service (*f*), and also of lands held in socage (*g*), and died, leaving a widow and an infant heir, then the guardian in chivalry might require the wife to be endowed *de la plus belle*, that is, of the most fair or best part of the tenements which she had as the infant's guardian in socage, rather than have her dower out of any of the lands holden by knight's service. Of course this kind of dower became impossible after tenure by knight's service was abolished by the statute of 12 Charles II. c. 24.

Now impossible.

This was the state of the law when the Act was passed for the amendment of the law relating to dower (*h*). The first enactment alters the old rule of equity that a woman shall not be entitled to dower out of a mere trust estate; and it also deprives what are called *uses to bar dower* of all the efficacy they formerly had in depriving the wife of her dower. For it enacts (*i*) that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land. Under the ordinary *uses to bar dower* the husband has an interest partly legal and partly equitable, equal to an estate of inheritance in possession; and the consequence is that his widow is now entitled in equity to dower out of the lands (*k*). But you will observe that the equitable estate must be an

Dower Act.

Wife now dowable under uses to bar dower.

Must be in possession.

(*f*) Lectures on the Seisin of the Freehold, pp. 17 *et seq.*

(*g*) *Ibid.* p. 20.

(*h*) Stat. 3 & 4 Will. IV. c. 105.

(*i*) Sect. 2.

(*k*) *Fry v. Noble*, 20 Beav. 598; affirmed, 7 De Gex, M. & G. 687; *Clarke v. Franklin*, 4 Kay & J. 266.

estate of inheritance *in possession*, or equal to an estate of inheritance in possession; so that there is still no right of a married woman to any dower out of any estate which belonged to her husband only in remainder expectant on an estate of freehold (*l*).

Dower out of
right of
entry or
action.

Sect. 4.
Alienation by
husband.

Sect. 5.
Debts of hus-
band.

Sect. 6.
Declaration
against
dower.

The next enactment alters the law which required a seisin either in deed or in law to be in the husband at some time during the coverture. It provides (*n*) that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. This enactment so far is in favour of the widow. The next enactment, however, places the widow's dower entirely in the hands of her husband. Section 4 provides that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will (*n*). And the fifth section enacts that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower. I mentioned that under the old law the dower of the wife was not affected by or subject to any of the debts of her husband (*o*), but now her dower may not only be taken from her by him, but it is chargeable with his debts and incumbrances. The sixth section enacts that a widow shall not be entitled to dower out of any land

(*l*) *Ante*, p. 81.

(*m*) Sect. 3.

(*n*) *Lacey v. Hill*, L. R., 19 Eq.

346.

(*o*) *Ante*, p. 81.

of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. In consequence of this enactment a declaration is now usually inserted in purchase deeds that the widow of the purchaser shall not be entitled to dower out of the land purchased. Persons who make this declaration should take care not to die intestate, as, in that case, their widows may be left entirely destitute of any provision. The seventh section enacts that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when, by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land. And the eighth section enacts that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Sect. 7.
Exclusion by will.

Sect. 8.
Conditions by will of husband.

The ninth section enacts that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. Before this enactment the question frequently arose whether a woman was entitled to her dower in addition to any benefit given to her by her husband's will, or whether she was bound to elect between her dower and the benefit intended for her (*p*). This question can now no longer arise. If the husband gives any estate or interest whatever in the lands for the benefit of his widow,

Sect. 9.
Devise to widow.

Election by widow.

(*p*) See *Thompson v. Burra*, L. R., 16 Eq. 592.

Sect. 10.
Saving of
gift of per-
sonal estate
or of land
not dowerable.

she must take that instead of her dower. But section 10 enacts that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will. And section 11 provides that nothing in the Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them.

Sect. 11.
Husband's
covenant.

Legacies in
bar of dower.

A legacy given by a man to his widow in satisfaction of her dower was considered as entitled to priority in payment over his other legacies, inasmuch as the other legacies were simply voluntary, whereas the gift to a widow was in consideration of her relinquishing her right to dower; and although the dower of a wife is now placed in the power of her husband, yet the Act enacts (g), that nothing therein contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. But it has been held that a widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband in satisfaction of her dower, where the only real estate which the testator had was conveyed to him with a declaration against dower (r).

Entitled to
priority.
- Exception.

Extent of
Act.

The last enactment (s) is that the Act shall not extend to the dower of any widow who shall have been married on or before the 1st of January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st day

(g) Sect. 12.

(r) *Roper v. Roper*, L. R., 3 Ch.

D. 714.

(s) Sect. 14.

of January, 1834, the effect of defeating or prejudicing any right to dower.

This Act has been decided to extend to gavelkind lands (t); although, as we have seen, it does not extend to freebench of copyhold lands (u). It extends the rights of the widow to estates holden in trust, and to mere rights of entry, on the one hand; and, on the other hand, it places the wife's right of dower entirely in the hands of her husband, in case he chooses to deprive her of any provision out of his lands. Act extends to gavelkind.

In my next Lecture I hope to speak of the husband's estate by *curtesy* in the lands of his wife.

(t) *Farley v. Bonham*, 2 John. & H. 177. (u) *Ante*, p. 91.

LECTURE VII.

Curtesy.

WE now come to the consideration of the estate and interest which the law, in the absence of any provision by settlement or otherwise to the contrary, gives to a husband in the freehold land of which his wife is seised in fee simple or fee tail in possession. The law on this subject is contained in two sections of Littleton's Tenures. Section 35 is as follows:—"Tenant by the curtesy of England is where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet, if the wife dies, the husband shall hold the land during his life by the law of England; and he is called tenant by the curtesy of England, because this is used in no other realm but in England only." And in section 52 is the following—"Memorandum. That in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue which he hath by his wife may by possibility inherit the same tenements, of such an estate as the wife hath as heir to the wife; in this case after the decease of the wife he shall have the same tenements by the curtesy of England, but otherwise not."

Husband's
estate during
wife's life.

In addition to this right to hold after the death of his wife, the husband acquires, by the marriage, a freehold interest during the joint lives of himself and his wife, in all such freehold property of inheritance as she is seised of at any time during the coverture. The husband and wife are said to be seised in fee in right of the wife. This is the case whether issue has been

born or not. But, after the birth of issue, a husband becomes tenant by curtesy initiate; and, after the birth of issue, he alone was in former days entitled to do homage to the lord for the lands (a); whereas, before issue were born, he and his wife must have performed that service together (b). The husband, therefore, during the joint lives of himself and his wife, is entitled to the receipt of the whole profits of his wife's lands. An exception to this rule has been made by the Married Women's Property Act, 1870 (c). This Act enacts, that where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of that Act (which took place on the 9th of August, 1870) as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same. This Act, you will observe, applies only to lands to which a married woman becomes entitled by descent as heiress or co-heiress of an intestate person. It does not apply to any lands which she may acquire by deed or will. This statute and the Act I shall presently refer to, enabling a tenant by the curtesy to grant leases, are the only statutes that I am aware of which interfere in any way with the interest which the common law of England gives to the husband in the lands of his wife.

Homage.

Exception:
descent on
wife as
heiress.

When the wife is seised of an equitable estate only, the whole legal fee simple being outstanding in trustees, the husband is entitled in equity to the receipt of the rents and profits for his own benefit during the coverture; and he may assign the same, either voluntarily

Trust estate
of lands.

Wife's equity
to a settle-
ment.

(a) Lectures on the Seisin of the Freehold, p. 9; Litt. s. 90.

(b) 1 Roper's Husband and Wife, p. 3.

(c) Stat. 33 & 34 Vict. c. 93, s. 8.

Issue born
alive.

*Barker v.
Barker.*

curtesy after his wife's decease. The only issue who can inherit such lands are heirs male, sons or son's sons, and so on. A daughter cannot by possibility inherit as heir male. The birth of a daughter will not, therefore, be sufficient to entitle the husband to curtesy. Next the husband must have issue by the wife *born alive*; but if he has issue born alive, it matters not whether the issue die or live. And it has been laid down (*l*), that if husband and wife have issue, and the issue die, and after that lands of inheritance descend to the wife, of which she actually becomes seised by entry, the husband, on his wife's death, will be entitled to curtesy in these lands. On the other hand, the case of *Barker v. Barker* (*m*) affords an example of the exclusion of the husband from curtesy on the ground that his issue could not possibly become entitled to the lands in question *as heir to the wife*. A testator in that case devised certain lands to Ann Barker and her heirs, but if she died leaving issue, then to such issue and their heirs; and the Vice-Chancellor, Sir L. Shadwell, held that the estate which the wife had was determined by her dying leaving issue, by which the children took as purchasers; by force of the gift, therefore, the wife had not such an estate as could descend to her children, they taking as purchasers. The consequence was that the husband was not entitled to be tenant by the curtesy.

Remainder on
estate of free-
hold.

Joint
tenancy

As an actual seisin is required to be obtained by the wife, it follows that the husband has no curtesy of an estate in remainder or reversion expectant on an estate for life, or other estate of freehold. There is also no curtesy of an estate held in joint tenancy, as there is no dower out of such an estate; for, on the death of one joint tenant, the whole survives to his companion or companions.

(*l*) *Perkins*, s. 472.

(*m*) 2 Sim. 249.

With regard to estates of which the wife is seised in equity only, we have seen that, in the corresponding case of the husband being seised in equity, his wife was not entitled to dower out of the lands (n). But equity, whilst denying dower to the wife out of the husband's equitable tenancy, has allowed curtesy to the husbands of women seised in fee of equitable estates. On this subject, however, there has been much conflict of opinion, in the case where the wife is entitled, either to the rents or profits of the estate, or to the estate itself, for her separate use independently of her husband. I believe it has never been clearly ascertained at what period and under what circumstances equity first began to allow wives to have estates for their separate use independently of their husbands. But that such estates have been permitted in equity for many years there can be no doubt. It was thought at one time that in order to give a wife a power, in equity, to dispose of freehold lands, she should have such a power expressly limited or reserved to her—a power in fact of appointment (o)—under which she might appoint the lands to such persons as she should think proper. And I apprehend that this is still the case, if it be wished to empower the wife to dispose of the *legal estate* in the lands, as distinguished from the equitable interest belonging to her. If it be wished to give the wife absolute control, both at law and in equity, I think that the lands should be settled to such uses and in such manner as the wife by deed or will shall appoint, and in default of and subject to any such appointment, to the use of trustees and their heirs during the life of the wife, in trust for her for her separate use, independently of her husband, and after the decease of the wife, then to the use of the wife, her heirs and assigns for ever, so as to vest the reversion in her. In this case there can be no doubt that the

Estate in equity.

When wife entitled for her separate use.

Wife can convey legal estate by power of appointment.

(n) *Ante*, pp. 54, 90.

(o) *Ante*, p. 39.

Wife may
convey equitable
estate
for her separate
use.

*Taylor v.
Meads.*

wife may, by the exercise of her power, either by deed or will, convey the whole estate to whomsoever she may please, without the necessity of any concurrence of her husband. If, however, lands be vested in trustees simply in trust for the separate use of a married woman, it is now held that it is competent for her by deed or will to dispose of the *equitable* estate or interest in such lands, without the concurrence of her husband. But, as the legal estate is vested in the trustees, it will be necessary that they should convey that legal estate to any person to whom the wife may have sold or devised the lands by virtue of her equitable estate therein for her separate use. For the doctrine is a doctrine of equity and not a doctrine of law. This point was decided by Lord Westbury in the case of *Taylor v. Meads* (p). "The true theory of her alienation is," said his lordship (q), "that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the feme covert's equitable interest; and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete, both at law and in equity." "With regard to ordinary equitable estates," his lordship continues, "belonging to a feme covert,—for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee, who afterwards marries,—equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be conveyed *inter vivos* in the same manner as a legal estate; and in like manner an estate of this nature cannot be devised by a feme covert; for the incapacity to make a will of lands by the 14th section of 34 & 35 Hen. VIII.

(p) 4 De Gex, Jones & S. 597.

(q) Page 604.

c. 5, is in this respect not removed by the Act of 1 Vict. c. 26. But the interest created by the separate use is a creation of a Court of Equity to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a power of alienation that proceeds upon the basis of the existence of control and interest in the husband and personal disability in the wife." "I must hold, therefore, that a feme covert, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* or will" (r).

Sometimes the trust is for the wife in fee, but the trust for her separate use extends only to the rents and profits to accrue due during her life. And the question has then arisen, whether, after her death, her husband is entitled to curtesy out of these lands? It has been held, that in this case the husband is entitled to his curtesy. The ground of this decision appears to me to be well explained by the Vice-Chancellor Sir John Leach in the case of *Morgan v. Morgan* (s). In this case property was, by a marriage settlement, conveyed to trustees in fee, upon trust for the sole and separate use of the wife for life, with power for her to appoint the fee by deed or will; and, for want of appointment, in trust for her, her heirs and assigns. She made no appointment and died, leaving her husband surviving her and also leaving issue a son. And it was held that the husband was entitled to be tenant by the curtesy in equity of those lands. The Vice-Chancellor in his judgment says: "Equity follows the law in the quality of estates, and it is to be stated generally that a husband will become tenant by curtesy wherever the wife is in possession of an equitable estate of inheritance

Trusts for
separate use
of wife for
her life.

*Morgan v.
Morgan.*

(r) Page 607.

(s) 5 Maddock, 408; see also
Follett v. Tyrer, 14 Sim. 125.

and has issue by the wife capable of that inheritance. There is no doubt here that the wife had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life." . . . "The wife was in possession of this equitable estate by receipt of the rents and profits during the coverture, and there being issue capable of the inheritance, the husband, according to the rule stated, must be entitled to the curtesy, unless it can be held that the direction that the wife should take the profits to her separate use amounts to an express intention to exclude him. At law the husband cannot be excluded from the enjoyment of property given to or settled upon the wife; but in equity he may; and this, not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly by a direction that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be entitled to be tenant by the curtesy. Such a provision was actually made in the case of *Bennett v. Davis* (t), and was acted upon by this court. Here the husband is partially and not wholly excluded from the enjoyment of his wife's property. This court would, according to the intention of the settlement, have restrained him from all interference with the rents and profits during the life of the wife; but, there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right, as tenant by the curtesy, in the equitable inheritance of his wife." It seems to me that these observations suggest the true rule upon this subject. If the exclusion of the husband is to be confined to the coverture only, then there is no reason why he should not have curtesy in equity of his wife's equitable estate of inheritance. But the exclu-

(t) 2 Peere Williams, 316.

sion may be total; and the question then arises whether, if the lands themselves are simply given in trust for a married woman and her heirs for her separate use, this should be considered in equity as expressive of an intention totally to exclude the husband from his curtesy. It was so decided by Vice-Chancellor Stuart in the case of *Moore v. Webster* (u). In this case the testator devised his lands to his children as tenants in common in fee; but if any of his children were daughters, the whole to them or her, independently of any husband or husbands she or they might have, and free from his and their control and liabilities, and to be assigned and disposed as she or they might think fit by any deed or will in writing. The Vice-Chancellor was of opinion that the authorities were as clear as the principle. Where the husband is not excluded from all interest in the fee, though he may be from the life estate, he is not excluded from being tenant by the curtesy. In this case, however, the words operated as a total exclusion of the whole right and interest; and the case for the husband failed. However, in a later case, a contrary determination was come to by Vice-Chancellor Malins in the case of *Appleton v. Rowley* (x). The testator by his will devised his real estate to trustees to the use of Alice Key, her heirs and assigns, for ever, free from the control of any husband with whom she might intermarry, and her receipt alone should be an effectual discharge to the trustees for the time being for all purposes and upon all occasions. The Vice-Chancellor held that Alice Key having had issue, her husband was entitled, after her decease, to be tenant by the curtesy of these houses. His honor was of opinion that it would be contrary to every principle that a clause, introduced for the benefit and protection of the wife, should prevent the husband from having his right to the curtesy; and his honor

*Moore v.
Webster.*

*Appleton v.
Rowley.*

(u) L. R., 3 Eq. 267.

(x) L. R., 8 Eq. 139.

expressed himself unable to concur in the decision of *Moore v. Webster*; for the whole equitable fee was given to the wife. The view of Vice-Chancellor Malins was adopted by the late Mr. Lewin in his treatise on Trusts (y). And in the recent case of *Cooper v. Macdonald* (z), where, however, the point did not call for a decision, the present Master of the Rolls expressed an opinion in favour of the same view, treating the case of *Morgan v. Morgan* (a) as a conclusive authority on the point. But that case was decided, as we have seen, on the ground that the husband was partially and not wholly excluded from the enjoyment of the property. And Sir John Leach seems to have thought that a distinct declaration that the husband should not be entitled to be tenant by the curtesy would exclude him. The question is whether a simple declaration that the whole of the property shall be held in trust for the wife, her heirs and assigns, for her separate use, independently of her husband, is sufficient to exclude him from his curtesy, or whether such a declaration is merely intended to give the wife a power of alienation over the fee, leaving the husband to his curtesy in default of her alienation. It seems to me that Sir John Leach would probably have concurred with Sir John Stuart in thinking that such a declaration was sufficient to exclude the husband. But the weight of authority appears to be now in favour of the decision of Sir R. Malins in *Appleton v. Rowley* (b).

(y) Lewin on Trusts, p. 607, 6th ed.

(z) L. R., 7 Ch. D. 288.

(a) 5 Mad. 408.

(b) L. R., 8 Eq. 139, *ante*, p. 107. The language of Lord Hardwicke on this subject in *Roberts v. Dixwell*, 1 Atk. 607, and *Hearle v. Greenbank*, 3 Atk. 695, 715, as reported, seems cer-

tainly inconsistent. But if Lord Hardwicke were here to defend himself, he might perhaps remark, that in *Roberts v. Dixwell* the separate use was confined to the life estate, and that there was not there, as there was in *Cooper v. Macdonald*, an additional clause attaching the trust for separate use also on the in-

If lands should be limited to such uses as the wife shall by deed or will appoint, and, in default of appointment, to the use of the wife, her heirs and assigns for ever (c), there is no doubt that an exercise by the wife of her power of appointment will defeat the estate, which before was vested in her in default of appointment, and so will deprive the husband of his estate by the curtesy in the lands appointed, although he may have had issue born of the wife. And it would seem upon principle that, wherever the estate of the wife is defeated by a shifting or springing use, of which in truth an appointment is only a species, that, the estate being defeated, the curtesy should be defeated also. The contrary, however, was decided in the case of *Buckworth v. Thirkell* (d), a case which has been frequently remarked upon and objected to; but which I believe has never been overruled, and therefore may be considered as still law. The case was this. The testator devised lands to trustees and their heirs, to receive the rents and profits, and to apply them for the maintenance of Mary Barnes till she arrived at the age of twenty-one years, or till she married; and, on her arriving at such age or marrying, then to the use of Mary Barnes, her heirs and assigns; but in case Mary Barnes should die before the age of twenty-one years and without leaving issue, remainder over. Mary Barnes married and had a child, which child died, then

Defeazance of wife's estate by appointment.

Defeazance of wife's estate by shifting use.

Buckworth v. Thirkell.

heritance; whilst in *Hearle v. Greenbank* the inheritance was not expressly limited to the heirs of the married woman, but only vested in her by implication from the absolute power of disposition over the inheritance conferred on her by the trust in question, showing an intention totally to exclude the husband, by giving the entire inheritance, and not merely the life estate, to her separate use.

If it be replied, that in *Morgan v. Morgan* the wife had a general power of appointment, the answer would be,—True, but she did not exercise it, and a power unexercised leaves intact the limitation in default of appointment.

(c) See *Ray v. Fung*, 5 B. & Ald. 561, a case of dower; *Cooper v. Macdonald*, L. R., 7 Ch. D. 288.

(d) 3 Bos. & Pul. 652 n.

Mary died before she arrived at the age of twenty-one years. The question was whether Mary's husband was entitled to be tenant by the curtesy. And it was held that he was so entitled. It was considered that, under the devise, Mary was seised of an equitable estate in fee simple determinable in the event of her dying under twenty-one, and without leaving issue, which event happened. So that, in the event that happened, the equitable estate in fee simple of Mary shifted away, by virtue of the conditional limitation, and was destroyed for all purposes, except as appears by this decision for the purpose of entitling the husband to be tenant by the curtesy. Mr. Butler, in his note to Coke upon Littleton (*e*), disapproves of this decision; which certainly appears to be contrary to principle.

Curtesy of
gavelkind.

In gavelkind lands the husband has a right of curtesy whether he has had issue born alive of his wife or not; but he is entitled only to a moiety of the lands of his wife; and, if he marries again, his estate by the curtesy ceases.

Copyholds.

With regard to copyholds, the right of the husband in the land of his wife depends upon the custom of the manor. A special custom is required both to entitle the husband to curtesy and the wife to freebench.

Protector.

An estate vested in the husband as tenant by the curtesy is sufficient to make him protector of the settlement under the Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance (*f*). It is there provided, that an estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement,

(*e*) Co. Litt. 241 a, n. (4).

(*f*) Stat. 3 & 4 Will. IV. c. 74,
s. 22.

within the meaning of that clause which makes the owner of a prior estate protector of the settlement, whose consent must be had in order to the barring of estates in remainder or reversion expectant on an estate tail (g).

The dower of a woman is forfeited by adultery; but the law has been more indulgent to the husband, and holds, that his living in adultery is no forfeiture of his curtesy. The reason is, that by the Statute of Westminster the Second (h), the wife is deprived of her dower by leaving her husband and going away and continuing with an adulterer; whereas there is no law by which the husband incurs a forfeiture of his title to curtesy for such misconduct on his part.

Curtesy not forfeited by adultery.

Dower forfeited by adultery.

Both tenants in dower and tenants by the curtesy are forbidden to commit waste. By the Settled Estates Act, 1877 (i), it is provided, that it shall be lawful for any person entitled to the possession or the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion-house and the demesnes thereof, and other lands usually occupied therewith, from time to time for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof: provided, that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other

Waste.

Power to lease.

(g) See Lectures on the Seisin of the Freehold, pp. 174, 175. and amending stats. 19 & 20 Vict. c. 120, 21 & 22 Vict. c. 77,

(h) Stat. 13 Edw. I. c. 34. 27 & 28 Vict. c. 45, 37 & 38

(i) Stat. 40 & 41 Vict. c. 18, Vict. c. 33, and 39 & 40 Vict. c. 30.
s. 46, repealing, consolidating

benefit in the nature of a fine; which rent shall be incident to the immediate reversion; and provided, that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit; and also a condition of re-entry on nonpayment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee. And every demise thus authorized is valid against the person granting the same, and against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband, as the case may be, of the person granting the same (*k*). And the execution of any lease by the lessor or lessors is to be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by the Act (*l*). And nothing in the Act is to authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor (*m*). This Act came in force on the 1st November, 1877. It repealed the Act to facilitate leases and sales of settled estates (*n*), which contained somewhat similar provisions, and which came into operation on the 1st of November, 1856. Before this Act, neither a tenant by the curtesy, nor a tenant in dower, was able to make any lease to endure beyond his or her own life.

In my next Lecture I hope to consider the subject of *Articles and Settlements* made upon marriage.

(*k*) Stat. 40 & 41 Vict. c. 18,
s. 47.

(*l*) Sect. 48.

(*m*) Sect. 56.

(*n*) Stat. 19 & 20 Vict. c. 120.

LECTURE VIII.

WE now come to the consideration of *Settlements made upon marriage*. In some cases the urgent haste of the parties leaves no time for the preparation of a regular settlement previous to marriage. In these cases *articles* for a settlement are often drawn, and not unfrequently drawn with that inaccuracy which is generally the result of haste.

The articles provide that a settlement shall be executed, which is to contain the provisions stipulated for, in favour of the intended husband and wife and the issue of the marriage. A trust of this sort, which is to be carried into effect by an instrument to be subsequently executed, is called *an executory trust*. Not that every trust is not in some sense executory, or to be executed at a future time. But a trust of this nature is, as you see, a trust to create a trust. The parties agree that their intention shall be carried into effect more accurately by a subsequent instrument. In the construction of executory trusts of this nature, the courts have shown great leniency. They have always borne in mind that the main object of marriage articles is to make a provision for the issue of the marriage. If, according to the rules of law, a settlement agreed to be made would give to either parent an estate tail, so as to enable him or her to bar such estate and to defeat the issue,—as if the articles should be that the lands of the husband shall be settled on him and the heirs of his body,—equity will consider that such an intention could not have been in the mind of the parties. And it will accordingly modify the actual settlement; so as to give

Articles.

An executory trust.

Construction of executory trusts.

Heirs of the body in articles.

to the parent a life estate, and to make the children purchasers of estates in remainder, expectant on the decease of such parent,—in fact settling the property on the husband for life, with remainder to his first and other sons severally and successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainders among them, in the event of any daughter or daughters dying without issue (*a*).

**Subsequent
settlement.**

If, subsequently to the articles, but before the marriage, a settlement is actually made, the settlement will, in such case, be considered to be a new agreement, and so will control the articles, and not be set aside by them (*b*). But if the settlement is recited to have been made in pursuance of the articles, in this case the presumption of a new agreement is done away with, and the settlement will be reformed according to the equitable construction placed upon the articles (*c*). And where a settlement is made after marriage, in pursuance of articles for a settlement made before marriage, the articles will control the settlement; and, if the court should think that, on an equitable construction of the articles, the children should have estates vested in them independent of their parents, the court will order the settlement to be reformed so as to follow what it considers the articles must have meant (*d*). In the same way articles agreeing to settle money on the children of the marriage equally, are considered, in equity, as intended only for such of the children as, being sons, attain twenty-one, or being daughters, attain that age or marry; and a settlement made after marriage in

(*a*) *Trevor v. Trevor*, 1 P. Wms. 622; affirmed, 5 Bro. P. C., Toml. ed. 122; Lewin on Trusts, p. 100, 6th ed.

(*b*) *Lagg v. Goldwire*, Cases temp. Talbot, 20; Fearn, Cont.

Rem. 107, 108.

(*c*) *Honor v. Honor*, 1 P. Wms. 123.

(*d*) *Hart v. Middlehurst*, 3 Atk. 371; *Streetfield v. Streetfield*, Cases temp. Talbot, 176.

pursuance of such articles will, if it literally vest the property in all the children equally, whether they attain twenty-one or not, be reformed according to the presumed intent. An example of this occurs in the recent case of *Cogan v. Duffield*, before the Court of Appeal (e). *Cogan v. Duffield.* This case was as follows:—Joseph Cogan intermarried with Agnes Duffield in March, 1867. Articles for a settlement were hastily drawn on the morning of the wedding day, and signed immediately before the marriage. By these articles it was provided that certain funds, the property of the intended wife, should be transferred into the names of Thomas Duffield and Bernard Cogan, the trustees of the settlement; the trusts of the income being “for the benefit of the said Agnes Duffield and Joseph Cogan during their lives, and the trusts of the capital being for and amongst the children, according to the appointment of the said Joseph Cogan and Agnes Duffield or the survivor of them; and, in default of appointment, to the children equally; and, in the event of there being no children, and of the said Joseph Cogan being the survivor, the trust property to be at his absolute disposal.” After the marriage a settlement was executed by which, after reciting the articles, the fund was settled upon trust to pay the income to the husband and wife during their joint lives, and, after the death of either, to the survivor for life; and after the death of the survivor, as to the capital, in trust for the children or child of the marriage as the husband and wife should jointly appoint; and, in default of appointment, in trust for the child or children, and if more than one as tenants in common. If there was no child then the fund was to be in trust for Joseph Cogan, if he survived his wife. The trusts of the settlement thus so far literally carried out the trusts of the articles. There was issue of the marriage one

(e) L. R., 2 Ch. D. 44.

child only who died when about six months old, in the lifetime of both parents. Then Joseph Cogan died in 1873, having made a will, by which he gave all his property to his brother Bernard Cogan, a defendant in the suit, whom he appointed his executor. In January, 1874, Agnes Cogan filed her bill in the Court of Chancery against Thomas Duffield and Bernard Cogan, the trustees of the settlement, praying for a rectification of the settlement, and for a declaration that she was entitled to the arrears due at Joseph Cogan's death of the rents of certain land, which had been purchased with part of the trust funds; and that she was absolutely entitled to all the trust property, and that the defendants might be ordered to convey and transfer the same to her.

Remarks on
Cogan v.
Duffield.

You will observe that in this case, if the trusts were to be literally carried out, the whole of the property would vest in the child of the marriage who died when about six months old; and, on his death, his father Joseph Cogan, as his sole next of kin, would be entitled to the whole of the property, subject only to the life interest of his wife Agnes Cogan therein. On the other hand, if the trusts were not to be construed literally, but the property was not to vest in the child until he attained the age of twenty-one years, then, there being no trust declared of the property in the event which happened of Mrs. Cogan surviving her husband, and the property having originally been hers, the trust would result back to her, and she would thus become absolutely entitled. And so it was held by Vice-Chancellor Bacon when the case came before him (*f*). On appeal his decision was affirmed by the Court of Appeal. Lord Justice James in his judgment says: "Marriage articles ought as far as possible to be construed so as to

Trusts not
construed
literally.

make the most effectual provision for the children of the marriage. This would be effected by inserting in the settlement a gift to such of the children as being sons should attain twenty-one, or being daughters attain that age or marry, or by giving the fund among the children, with a proviso giving over to the others of them the share both original and accruing of each child who, being a son, should die under twenty-one, or being a daughter should die under that age unmarried." He then refers to a decision of Lord Redesdale, who held that in such a case the fund should be limited to the children as tenants in common, with provisions for limiting over the shares of any who died under twenty-one and without issue; also to a decision of Sir Lancelot Shadwell, the Vice-Chancellor of England, who settled a fund, in a similar case, so as to give vested interest to those children only who being sons attained twenty-one, or being daughters attained that age or married. "If it were necessary to choose between these two schemes of settlement, I should," says the Lord Justice, "be rather in favour of that of the Vice-Chancellor of England, who was a great authority on matters of conveyancing; but, in the present case, it is unnecessary to decide the point, for in neither way could a child who died under twenty-one and unmarried become absolutely entitled to any part of the capital. The husband, therefore, could not acquire a title as representing his deceased child; and as he did not survive his wife, there is no other way in which a title through him can be made out. I am of opinion, therefore, that on this point the decree is right."

There was another point in the case:—The widow claimed, as I mentioned, certain arrears, which were due on Joseph Cogan's death, of the rents of certain lands purchased with part of the trust property. If the rents were his, the arrears, of course, would have

Articles construed to give wife a life estate for her separate use.

gone to Bernard Cogan as his executor, as part of his personal estate, and not to his widow. But the court held that the expression in the articles, which was that the income should be for the benefit of the intended wife and husband during their lives, was vague; and that, if the court had been called upon to decree the execution of a settlement, it would have given the first life estate to the wife for her *separate use*. And if she had been entitled to the first life estate for her *separate use*, of course she would have had a right to the arrears of the rents of the property purchased with part of the trust funds due at the death of her husband. It was held that the decree of the Vice-Chancellor which gave her these arrears was also right; and the appeal was accordingly dismissed.

Separate use.

Construction of settlements not executory.

Provision for issue.

The liberal construction to which I have just referred occurs only in cases of executory trusts, or trusts to be carried out by a settlement to be afterwards made. If, previously to marriage, a settlement is made, the trusts of which are clearly declared, there is no room for the elastic interpretation which the court thinks itself justified in using in cases where the settlement is not actually made, but only agreed to be executed. Even in this case, however, the court, in construing the trusts, always bears in mind that the main object of a marriage settlement is to make a provision for the issue of the marriage. And, if the trusts are at all ambiguous, it will strongly lean to such construction as shall effect this object. In many settlements trusts have been so framed as to make it doubtful whether, according to the true meaning of the settlement, the property is to vest in the children, being sons, at twenty-one, or, being daughters, at twenty-one or marriage; or whether those only of the children who survive the parents are entitled to the benefit of the trusts. In cases of this sort the court, having regard

to the interest of the children, always leans in favour of vested interests, and for this reason. A son attains the age of twenty-one years, and dies in the lifetime of his parents; but before his death he may have married and had children of his own. If the accident of his surviving his parents is to be the contingency on which he is to be entitled to his portion as a child of the marriage, it is evident that his wife and children must go without any provision whatever, unless he should happen to be living at the decease of the survivor of his parents. This is a very great hardship; and accordingly there is a long line of decisions in which the courts have struggled with words which appeared to create a contingency in the provisions for the children, and have held, that the children took vested interests, in order that, should they marry and have children in the lifetime of their parents, their children should not be left without provision. A leading case on this subject is that of *Woodcock v. The Duke of Dorset* (g). In that case the settlement was made after marriage; but it recited an intention on the part of Lord John Sackville, the settlor, to make a provision for himself and Lady Frances, his wife, and the issue of their bodies; and the trustees of the settlement were directed, out of the rents and profits of the estate thereby conveyed to them, to raise and pay the yearly sum of 200*l.* to the said Lord John and Lady Frances during their natural lives and the life of the longest liver of them; and on the further trust, that if the said Lord John and Lady Frances should *leave*, at the death of the survivor of them, any child or children of their two bodies begotten, to raise and pay the yearly sum of 200*l.* for the maintenance of such child or children, until such child or children should attain the age of twenty-one years; and then to raise the sum of 5,000*l.*, and pay the same to *such* child or children in equal

Court leans in favour of giving children vested interests.

Woodcock v. Duke of Dorset.

shares, upon their attaining their respective ages of twenty-one years; and if there should be but one such child, then to such child. This is the statement of the settlement as made in Brown's Reports; but it appears from the registrar's book that the real words of the settlement were not to pay the same to *such* child or children, but to pay the same to *the* child or children in equal shares, upon their attaining their respective ages of twenty-one years; and if there should be but one child, then to such child. The case, however, is usually referred to as decided on the words as stated in Brown's Reports. Lord John and Lady Frances had issue two children, viz., the defendant, the Duke of Dorset, and the late Lady Thanet, who died in the year 1778, having attained her age of twenty-one years in the lifetime of her mother, Lady Frances, and having survived her father, Lord John, but died in the lifetime of Lady Frances. And the question was, whether Lady Thanet, having died in the lifetime of her mother, was entitled to a share of the 5,000*l.* with the defendant, the Duke, or whether he, having survived his father and mother, was not entitled to the whole of that sum. And it was held, that the plaintiff, who was the administrator of Lady Thanet, was entitled in her right to a moiety of the 5,000*l.*, although she was not living at the death of the survivor of her parents. Lord Thurlow, the Lord Chancellor, said: "There is no word used to exclude Lady Thanet but the word *such*, upon which it might be contended that the property should not vest unless the children were infants at the decease of the survivor. Though the words are strong and difficult to manage, the intention of the settlement is the truth and honor of the case."

Lord Eldon's
comment.

Lord Eldon, in commenting upon this decision in the case of *Hope v. Lord Clifden* (*h*), says: "The words

if there should be but one such child, upon the natural construction, must mean one child left at the death of the survivor. It would be impossible to raise an ambiguity upon that in any other case than that of parent and child. In any other case the answer would be that the court had no right to say otherwise; but Lord Thurlow went this length, that, in the case of parent and child, a child having attained the age of twenty-one and having occasion for a portion, though dying in the lives of the parents, is a child living at the death of the survivor. He certainly goes that length upon the intention, observing that the words were very strong and difficult to manage."

If, however, the settlement should contain a provision that the shares of children of the marriage who may die in the lifetime of their parents should belong to their children in equal shares or otherwise, then the reason, which has induced the courts to put so violent a construction upon the words of the trusts, no longer holds. The object of the court in giving vested interests to the children of the marriage was, that in case they should die leaving children, their children should not be bereft of all provision; and this object of course becomes unnecessary, if the settlement itself makes a provision for the children of such children as shall die in the lifetime of the parents. In that case, therefore, if, on a fair construction of the settlement, the shares of the children of the marriage are contingent on their surviving their parents, the courts will interpret the trusts accordingly, and will not make any effort to construe the trusts as giving to the children of the marriage vested interests, whether they survive their parents or not. An example of this construction occurs in the case of *Jeyes v. Savage* (i). In this case the

When provision made for children of children who die.

Jeyes v. Savage.

(i) L. R., 10 Ch. 555.

trusts of the settlement were, after the death of the survivor of the parents, if they should *leave* any issue, who being daughters should marry or attain twenty-one, or being sons should attain twenty-one, to transfer the fund unto and equally among all *such issue* when they should attain twenty-one, or be married if a daughter or daughters with consent; with provision for their maintenance in the meantime. But there was this proviso, that if any such issue as aforesaid should happen to die before they should respectively become entitled to and actually receive their portions, leaving issue of their respective bodies them surviving, then such last-mentioned issue should take and be entitled to his, her, or their father's or mother's share or shares equally among them, to be paid and transferred at the same time or times as was declared concerning the whole original trust-moneys and the immediate issue of the marriage. There were four children of the marriage, two of whom died under age and unmarried in the lifetime of their parents. Another attained twenty-one and died a bachelor in the lifetime of the father; and the fourth attained twenty-one and survived both parents. And it was held that the whole fund went to the surviving child, and that the representative of the child who attained twenty-one and died in the lifetime of the father without issue took nothing. Lord Justice James in his judgment observed: "The instrument as it stands seems to my mind fairly and plainly to carry into effect the intention of the settlors, which I take to have been, that no child of the marriage who died in the lifetime of the parents should take a share; but that, if he left children, his children should take in his stead. To apply the doctrine of *Woodcock v. Duke of Dorset* to this case would be extending it to a case quite outside its principle."

courts on marriage articles and settlements. Where the trusts are executory, as in marriage articles, the courts mould them according to what they consider to be the true interest of the children of the marriage; and where they are not executory, they still bear strongly in mind that the intention of the settlement is to make a provision for the children. And in doubtful cases, and, as we have seen, even in some cases which could hardly be called doubtful, they construe the trusts as giving the children vested interests, if by making them contingent the children would, by their decease in the lifetime of the parents, be left without any provision.

and settle-
ments.

We now come to the framing of settlements. I mentioned in a former Lecture (*k*) that, in framing a settlement of landed property, it was always a point to be considered, whether or not the fee simple should be vested in the trustees of the settlement; and I mentioned that, in small settlements, where the estate is not to be entailed on the eldest son, it is more usual to vest the whole fee simple in the trustees. Another point to be considered is, whether the settlement is to be a real settlement or a personal settlement. For it ought to be either one or the other; and there ought never to be any provision in the settlement, by which the character of the property shall be changed from real to personal or from personal to real. Such a provision may often give rise to great hardship. Real property, as you know, descends to heirs, whereas personal property devolves on the executor of the will of the deceased, or, in default of a will, on the administrator of his estate, in trust for his next of kin. Now the next of kin are frequently and usually different persons from the heir at law. Any provision, therefore, in the settlement, which should have the effect of taking away any share of the

Framing of
settlements.

Fee simple in
trustees.

Whether real
or personal.
Ought to be
either one or
the other.

property from the heir or devisee of the real estate of a deceased child, and vesting it in his executor, or in his next of kin, or, on the other hand, any provision which should take the share of the deceased child away from his executor or next of kin, and give it to the devisee under his will of his real estates, or to his heir, must be productive of hardship. If the property is intended to go to the heir or devisee, let it go to him, and stay there. If it is intended to go to the executor or next of kin, let it go to them, and stay there. But do not insert any provision making it in the power of the trustees to take any share of the property away from one of these classes of persons, and to give it to the other class, by changing the nature of the investment of the trust property. This hardship is easily prevented, although there may be power given to invest settled money in the purchase of land, or to sell lands and invest the money in the funds or other securities of a personal nature. I mentioned in a former Lecture (1) that equity considers that that which is directed to be done has been done, so far as the interests of the parties are concerned. And you will see how readily the problem is accomplished, of continuing the property either as a personal or as a real settlement, and yet giving power to turn land into money by sale, or money into land by purchase.

Grant to
trustees for
sale.

A usual and very desirable method of settlement of a small landed property, in such a way as to make a provision for the intended husband and wife and the children of the marriage, is as follows:—Let the whole property be conveyed to the trustees of the intended settlement in fee simple. This is done by a grant of the lands unto the trustees and their heirs, to hold to them and their heirs to the use of the settlor and his

(1) *Ante*, p. 56.

heirs until the marriage, and afterwards to the use of the trustees, their heirs and assigns, for ever. This vests in them the whole legal estate. It is then declared that they shall stand possessed of the lands after the solemnization of the marriage, in trust to sell, with the consent of the husband and wife, or of the survivor of them, and, after the decease of the survivor of them, at the discretion of the trustees. This trust for sale has the effect of converting the property in equity into money or personal estate. It is some day or another to be turned into money; and the fact that it cannot be sold without the requisite consent does not prevent the character of personalty from attaching to it in equity; and in equity, thenceforth, it is regarded as money and not as land (*m*). The settlement thus becomes a personal settlement,—a settlement of personal estate. The trusts declared are declared of the money which shall arise from the sale; and it is provided that, until a sale, the rents and profits of the lands shall devolve in the same way as the interest and annual produce of the money to arise from the sale, would have gone, if a sale had actually been made, and the money invested in pursuance of the trusts. The trusts of the money to arise from the sale are usually declared by a separate deed of even date; so that, when the property is sold, the conveyance of the lands to the trustees may be handed over to the purchaser, as one of his title deeds, and the settlement of the money may be retained by the trustees for their guidance in executing its trusts. The trusts then of the money to arise from the sale are referred to as being declared in a deed bearing even date with the conveyance to the trustees and made between the same persons as are parties thereto.

Equitable
conversion.

Separate
deed of decla-
ration of
trust of sale
monies.

(*m*) *Thornton v. Hawley*, 10 Ves. Lewin on Trusts, pp. 776, 777,
129; 1 Jarm. Wills, 556, 3rd ed.; 6th ed.

Power to
lease land un-
sold.

It is desirable to add to the conveyance to the trustees in trust for sale, a power for them, their heirs and assigns, to lease the property, or so much thereof as may remain unsold, say for twenty-one years at a rack rent in possession, with the consent of the husband and wife or the survivor of them. Now in this case the power given to the trustees to lease, is not strictly and technically a *power* of appointment of a use under the Statute of Uses. The trustees have the whole fee simple vested in them; and, when they grant a lease, they accordingly do it out of their legal estate, quite independently of the Statute of Uses; exactly in the same manner as any other owner in fee does when he grants to a tenant a lease of part of his land. The power of leasing is in fact restrictive and nothing more. Although the estate of the trustees enables them at law to grant a lease at any length and at any rent, yet this provision prevents them from exercising their legal power of granting leases beyond a lease for twenty-one years in possession, and at a rack rent. A *rack rent* is the fair rent of the property, when it is leased without any premium being paid by the lessee. Then follows a power for the appointment of new trustees. The settlor having granted the land to the trustees in fee, upon trust for sale as above mentioned, and the powers of the trustees of leasing the property having been defined, and a power to appoint new trustees having been reserved, the settlor usually covenants with the trustees for the title of the property. If he became entitled to the land as a purchaser, he covenants so far only as regards his own acts and the acts of those claiming under him; but if he derived title under a will, then he covenants for the title so far as regards both his own acts and the acts of the testator, from whom he derived his title. And that brings the first deed to an end.

Rack rent.

Covenants for
title.

The second deed recites the former, and declares the trusts of the money to arise from the sale. If the lands be the wife's, the first trust will usually be to pay the income to her for her separate use, independently of her husband, and without any power for her to anticipate the same; then in trust for the survivor of the husband and wife for his or her life; and, after the decease of the survivor, in trust for the children of the marriage as the husband and wife may jointly appoint by deed, or as the survivor may appoint by deed or will; and, in default of appointment, and subject to any partial appointment, in trust for the children of the marriage, who being sons shall attain twenty-one, or being daughters shall attain that age or marry; with a clause called the hotchpot clause, providing that no child to whom any appointment shall have been made shall take any part in what is unappointed without bringing his or her appointed share into hotchpot, and accounting for the same accordingly. There then follow trusts for the maintenance and education of the children during minority, a power of advancement, and then a provision for the ultimate destination of the moneys in case there shall be no child of the marriage who, being a son shall attain twenty-one, or being a daughter shall attain twenty-one or marry. There are then powers for the alteration and variation of the investments, such powers being generally required to be exercised with the consent of the husband and wife during their lives, and of the survivor of them during his or her life. Then follows a power of appointing new trustees. And this brings the settlement to an end.

Trust of sale
money.

Hotchpot.

In my next Lecture I intend to refer more particularly to the first of the provisions above mentioned; namely, the trust of the income for the wife for her *separate use* without power of anticipation.

LECTURE IX.

I MENTIONED in my last Lecture (a) that if the property settled is the property of the wife, it is usually settled on marriage on trustees, in trust, if the lands are to be sold, to pay the income of the purchase-money, or, if it be personal estate, then the income of such personal estate, to the wife during the joint lives of herself and her husband for her separate use and without any power of anticipation. I shall say a few words first respecting property limited to a wife's separate use, and afterwards on property limited to her separate use without any power of anticipation.

Separate use. All property, whether real or personal, may be given for the *separate use* of a married woman; and such a gift is considered in equity as giving her an absolute power of disposition over such property, either by deed or writing, or by will, without any consent or concurrence being required on the part of her husband. And so, conversely, if property is settled upon such trusts as a married woman may by deed or will appoint, and in default of appointment in trust for herself, her executors or administrators, this is looked upon as, in fact, her separate property and subject to the same liabilities (b). If the income of property is given to the separate use of a married woman during her life, or during the joint lives of herself and her husband, she has power to dispose of the same, either by selling her life interest,

(a) *Ante*, p. 127.

(b) *The London Chartered Bank of Australia v. Lempriere*, L. R., 4 Privy Council Cases, 572: *Mayd*

v. Field, M. R., L. R., 3 Ch. D. 587; 24 W. R. 660; 45 L. J., Ch. 699.

or by mortgaging it, as she may please, without or against the consent of her husband; and if the capital or corpus of property is given in the same way, she may dispose of it in like manner. In equity she is regarded as a feme sole, and has the same power of disposition as if she were unmarried.

There is one kind of property limited to a married woman's separate use, on which it would be desirable to say a word, and that is *pin money*, which is usually Pin money. granted, on the settlement of landed property, in cases where the first life interest is given to the husband. In such a case a yearly sum, known as pin money, is usually settled on the wife for her separate use. The object of pin money is to provide the wife with a yearly allowance for her dress and pocket money. In some cases the wife and husband live together, the wife being supported by her husband and furnished by him with wearing apparel and other necessities, and the pin money charged on his estate is not claimed by her. In such a case it is held that, if she should die having made a will, bequeathing all property belonging to her for her separate use, her executors will not be entitled to any arrears of her pin money (*c*). And she herself, if she survive her husband, will only be entitled to arrears of the pin money for *one year* prior to the death of the husband (*d*). But if the wife has demanded her pin money without success, or if she has lived apart from her husband without any allowance for her maintenance, she will be entitled to all arrears of her pin money which were due at her husband's death (*e*). All *savings* which a woman may make out of her pin Savings. money, or out of the income of any property settled

(*c*) *Howard v. Digby*, 2 Cl. & Fin. 653.

(*d*) *Lord Townshend v. Windham*, 2 Ves. sen. 7.

(*e*) *Ridout v. Lewis*, 1 Atk. 269.

upon her for her separate use, are considered as part of her separate estate (*f*), and may be disposed of by her, without the consent of her husband, either in her lifetime or by her will.

Debts of
married
woman.

Lord Justice
Turner's
statement of
the law.

Johnson v.
Gallagher.

With regard to the liability of the separate estate of a married woman to the payment of her debts, there has been a good deal of difference of opinion. But this much is clear, that, if a married woman has separate estate, and enters into a contract or covenant, which is expressed, as such a contract or covenant ought to be, to be made with the intent to bind her separate estate, then her separate estate will be liable in equity to such contract or covenant. The principle, so far as the law is yet settled, on which the court acts in cases of this sort, is laid down by the late Lord Justice Turner in the case of *Johnson v. Gallagher* (*g*). His lordship says (*h*), "It seems to follow that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely. According to the best opinion which I can form on a question of so much difficulty, I think

(*f*) *Sir Paul Neal's case*, cited
in *Herbert v. Herbert*, Pre. Cha.
44.

(*g*) 3 De Gex, Fisher & Jones,
494, 513.

(*h*) Page 514.

that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it is so or not is a question to be judged of by this court upon all the circumstances of the case."

The opinion thus expressed by the Lord Justice Turner has been adopted and approved by the Privy Council in a recent case. The case to which I refer is *The London Chartered Bank of Australia v. Lemprière and others* (i). The Lord Justice James, in delivering the judgment of the court in that case, cites at length a great part of the judgment of the Lord Justice Turner in *Johnson v. Gallagher*, and then proceeds thus (k):—

London Chartered Bank of Australia v. Lemprière.

"The term 'general engagement' is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate—for example, for buying or selling, or letting or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But that does not affect the rule as laid down by Lord Justice Turner as to general engagements, as to which it appears that they were made with reference to, and upon the faith or credit of, the separate estate." And he then goes on subsequently (l)—"It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a surveyor, or a builder, or tradesman, or hire labourers or servants, and very unjust, if she did, that they should have no remedy

Judgment of Lord Justice James.

(i) L.R., 4 Privy Council Cases, 572.

(k) Page 593.

(l) Page 594.

against such separate property." And in the recent case of *Mayd v. Field* (m), before the present Master of the Rolls, a married woman, by the settlement made previously to the marriage of her daughter, entered into a covenant that her heirs, executors or administrators should, within six months after her decease, pay to the trustees of that settlement 1,000*l.* with interest from her death. And the Master of the Rolls, after citing the judgment of Lord Justice James in the case I have just mentioned, decided that this covenant bound the property comprised in her own marriage settlement, which had been settled upon trust for such persons as she, during coverture, should by deed or will appoint, and subject thereto upon trust during the joint lives of herself and her husband for her separate use, and after the death of her husband, if she survived (which event happened), in trust for her, her executors, administrators and assigns. She had made a will under this power; and these trusts were considered as tantamount to a simple trust of the corpus of the fund for her separate use (n), and the property bequeathed by her was held to be charged with this debt.

Judgment of
the Master of
the Rolls.

Debts of
married
woman
having a
power of ap-
pointment.

We have seen that when a man exercises a power of testamentary appointment, the property appointed becomes liable to his debts (o). But, except in respect of judgment debts (p), there is no liability to debts where the power is not exercised (p). If a married woman has a power to appoint property by will only, and exercises this power, there has been a good deal of authority that the property so appointed is not liable to her debts (q). But the Judicial Committee of the Privy

(m) L. R., 3 Ch. D. 587; 24 W. R. 660; 45 L. J., Ch. 699.

(n) *Ante*, p. 128.

(o) *Ante*, p. 41.

(p) *Ibid.*

(q) *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Shattock v. Shattock*, L. R., 2 Eq. 182; 35 Beav. 489; *Blatchford v. Woolley*, 2 Drew. & S. 204.

Council have expressed an opinion in favour of the liability (r). If a married woman has a power to appoint property either by deed or will, and there is a gift over to other persons in default of her appointment, and her power is not exercised, the persons taking in default of appointment will be under no liability to her debts (s).

So much then for property limited to the separate use of a married woman. It is usual, however, in settlements where the income of the property is limited to a married woman for her life, or for the joint lives of herself and her husband, to state that it shall be for her separate use, *without any power for her to anticipate the growing payments thereof*. This restraint upon anticipation is, like separate use, a creature of the Courts of Equity; and it can only affect a married woman so long as she is a married woman. Before her marriage, and after her marriage if she becomes a widow and so a feme sole, a declaration that the income of property shall belong to her for her separate use, independent of any husband and without power of anticipation, is simply a nullity, so far as regards any restraint that it attempts to put upon her whilst she is single. She may, before her marriage and even in contemplation of her marriage, assign property so settled upon her to her intended husband himself for his own benefit, or in any other manner that she may think fit. In this respect she is, while single, exempt from the control which the court exercises over the separate estate of a married woman; and in truth no further restraint can be put upon her whilst single than can be put upon a man.

Restraint on anticipation.

Now with regard to such restraint upon alienation as can be put upon a man or a single woman, it is desirable

(r) *London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. C. 598. (s) *Johnson v. Gallagher*, 3 De Gex, F. & J. 517.

Condition not
to alien void.

Mary Portington's case.

Partial re-
straint.

that I should say a few words. The power of alienation is considered by the law to be an incident of property; and, if property be given to a man or single woman, with a direction that he or she shall not alien it, such condition is simply void. You may remember that in a former Lecture (*u*), I mentioned a case in which it was decided, that the right to bar an estate tail was an incident by law to such an estate; and that a condition, that a tenant in tail should not suffer a common recovery, was void as contrary to the policy of the law.

The case to which I referred is *Mary Portington's case* (*x*). In like manner a condition that any person, whether tenant for life or in fee, shall not alien is simply void. This doctrine, however, it must be remembered, applies only to alienations generally. There is nothing contrary to the policy of the law in a condition which imposes merely a *partial restraint* on the power of alienation. The doctrine on this point is thus laid down by Littleton in his *Tenures* (*y*). "Also if a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void; because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such condition is void." "But," Littleton continues (*z*), "if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from feoffee, &c., then such condition is good." It will be observed that the examples put by Littleton are merely exceptions from a general power

(*u*) Lectures on the Seisin of
the Freehold, p. 158.
(*x*) 10 Rep. 36.

(*y*) Sects. 360, 361.
(*z*) Sect. 361.

of alienation, and are not instances of a general restraint on alienation with particular exceptions; although such a restraint undoubtedly does not, as Littleton says, "take away all power of alienation." A power to appoint to all the world, except a certain class of objects, is a general power and does not tie up the property subject to it; but a power to appoint only amongst a class is a limited power, and ties up the property from the date of the creation of the power.

However, the Court of King's Bench in a case of *Doe d. Gill v. Pearson* (a), held valid a condition against aliena-
Doe d. Gill v. Pearson.

tion, which was a general restraint except as to a particular class of objects. In that case the testator, by his will, devised property to his two daughters, their heirs and assigns, as tenants in common, upon this special proviso and condition: "That in case my said daughters or either of them shall have no lawful issue, that then and in such case they or she, having no lawful issue as aforesaid, shall have no power to dispose of her share in the said estate so above given to them, *except to her sister or sisters, or to their children.* One of the daughters married J. Wait, and levied a fine with the concurrence of her husband of her moiety of the premises; and declared the use of the fine to be to the use of the defendant Pearson and his heirs, in trust for her husband, J. Wait, in fee. She then died, without having disposed of her share otherwise than by the said fine and indenture declaring the uses thereof, and never having had any issue. And the question was, whether this alienation by her in favour of her husband occasioned a forfeiture by reason of the condition, that if she had no issue she should not dispose of her share in the estates except to her sister or sisters, or to their children. And the court held that the condition was good; and that a forfeiture had been occasioned by the

(a) 6 East, 173.

Attwater v.
Attwater.
In re Macleay.

daughter having disposed of her share in the estates to her husband, instead of having disposed of it to her sister or sisters or to their children, as required by the condition. Some doubts were thrown on this decision by Lord Romilly, the late Master of the Rolls, in the case of *Attwater v. Attwater* (b). However, in the more recent case of *In re Macleay* (c), the present Master of the Rolls recognized the case of *Doe v. Pearson* as a binding authority, and decided that the following condition was valid. The testatrix devised as follows: "I give to my dear brother John the whole of the property given to me by my dear aunt Clara Perkins, consisting of the manor of Bletchingley in the county of Surrey, and the Pendell Court Mansion, with the land belonging to it, on the condition that he never sells it out of the family. John the devisee contracted for the sale of this property to a stranger; and the question arose, whether he could make a good title, having regard to the condition annexed to the devise to him that he never sells it out of the family. And the present Master of the Rolls, taking the strictly literal construction of the section of Littleton which I have cited, and following the case of *Doe v. Pearson*, was of opinion that the condition was valid, and that a good title could not be made to any person out of the family.

Gift over of
fee in default
of alienation
cannot be to
other than
heir.

I may here mention an important doctrine of law which respects the devolution of property in default of any alienation. As the power to alien is incident to property, so the devolution of property on the decease of its owner, without having made any alienation, is fixed by the law and cannot be altered. Land must descend to the heir of the last purchaser. Personal estate must devolve on the executors or administrators

(b) 18 Beav. 330, 337.

(c) L. R., 20 Eq. 186. This case was, however, questioned

by V.-C. Malins in *Dawkins v. Lord Penrhyn*, reported on the appeal only in 6 Ch. D. 318.

of the deceased owner. A provision therefore, that, in case of the decease of any person intestate, property which has been given to him *absolutely* shall go elsewhere than as the law prescribes, is altogether void. It is true, that in the case of *Doe d. Stevenson v. Glover (d)*, the Court of Common Pleas held, that a proviso annexed to a gift to a man in fee, that on his death, without having disposed of his interest, the same should go to a third person, was a valid conditional limitation. But this case must now be considered as having been overruled by subsequent authorities (*e*).

Doe v. Glover
now over-
ruled.

Although a condition not to alien is invalid, there is no objection to property being vested in trustees, in trust to pay the income to a man or to a single woman, until he or she shall alien the same, or shall attempt or agree so to do. In this case the attempt at alienation is the event on which the gift is to cease; there is no attempt here to give persons property, and at the same time to prevent their alienating. Here the alienation, or the attempt to alienate, is the event which sets a limit to the estate, and on the occurrence of which the estate and interest of the grantee comes to an end. In the same way, although it is unlawful to give property to a man or woman, with a condition, that in case of bankruptcy the same shall not go to his or her creditors, but shall be enjoyed by him or her, yet it is lawful to settle property on any person, so that the income thereof may be enjoyed by him or her until bankruptcy, and no longer. If, therefore, property be settled in trust to pay the income to a single woman until she shall anticipate the same by mortgage or other alienation, her interest will cease on any such alienation being made. But if property is settled upon a single woman for her life, with a proviso that she

Gift until
alienation
valid.

Gift until
bankruptcy.

(d) 1 C. B. 448.

M. & G. 152, 166; *Barton v. Barton*, 3 Kay & J. 512.

(e) *Holmes v. Godson*, 8 De Gex,

Condition not to alien void as to an unmarried woman.

shall not alien or anticipate the same, such proviso is void. And it makes no difference, so long as she is single, if it is settled on her *for her separate use*, independently of any husband whom she may marry, with a restriction against alienation. So long as she is single such a restriction is invalid; although, after her marriage, the rules of equity with regard to separate estate step in, and she, as a married woman having property thus settled upon her, cannot anticipate the same, if the settlement declares that it shall not be in her power to do so.

Fetter attaches on re-marriage.

On death of second husband fetter ceases.

Tullett v. Armstrong.
Scarborough v. Borman.

If the settlement is made in trust to pay the income to a married woman for her life, independently of her present *or any future husband*, and without power of anticipation, and her present husband dies, she then becomes a feme sole. The restraint on alienation is an invalid condition, and she may do what she pleases with the income for the rest of her life. But if she makes no alienation and marries again, she again becomes subject to the control of equity in respect of anticipation, and cannot anticipate the income thus remaining settled on her so long as she continues to be a married woman. Should her second husband die in her lifetime, she will again be set free to do what she pleases with her income for the rest of her life. So that this restriction, being invalid except when applied to the separate estate of a married woman, does not bind any woman so long as she is single; but, if existing at the date of her marriage or created afterwards, it will bind her so long only as her state of a married woman continues. The doctrine on this subject was settled by the cases of *Tullett v. Armstrong* and *Scarborough v. Borman* (*f*), in which it was held that if property be given or settled to the separate use of a

woman, unmarried when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when discoverd, be enjoyed by her as her separate estate during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it. In that case Lord Cottenham, then Lord Chancellor, thus speaks (g):—

“When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a feme sole as to bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases. If any rule, therefore, were now to be adopted by which the separate estate should, in any cases, be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed. A feme covert with separate estate, not protected by a clause against anticipation, is in most cases in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependence must be upon her husband not exercising that influence or control which, if exercised, would in all probability procure the destruction of her separate estate. In the case of a

Judgment of
Lord Cotten-
ham.

gift of separate estate with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose, and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together. Indeed, I do not find any allusion in any case to the possibility of the one surviving the other until after the discussion as to the continuing of the separate estate through a subsequent coverture had commenced." And further on (*h*): "After the most anxious consideration, I have come to the conclusion that the jurisdiction which this court has assumed in similar cases justifies it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it throughout a subsequent coverture; and, resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this court first established the separate estate it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found as part of such law that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation." And again (*i*): "In establishing the validity of the separate estate, with its qualification which

(*h*) Page 405.

(*i*) Page 407.

constitutes its value—that is, the prohibition against anticipation—I am not doing more than my predecessors have done for similar purposes, and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during the subsequent coverture, or, what would in many cases be a greater evil, that it should exist without the protection of the clause against alienation.”

If the marriage should be dissolved by reason of the adultery of the wife, still the trusts of the settlement for her benefit during the joint lives of her husband and herself will continue notwithstanding the dissolution of the marriage. The wife's adultery, though a forfeiture of her dower (*k*), is not a forfeiture of any benefit conferred upon her by her marriage settlement; and the dissolution of the marriage for adultery makes no difference. This was decided by Lord Campbell when Lord Chancellor, in the case of *Evans v. Carrington* (*l*). This decision has been followed by the present Master of the Rolls in the case of *Fitzgerald v. Chapman* (*m*), notwithstanding some decisions to the contrary by the Vice-Chancellor Stuart, and also by his lordship's predecessor, the late Lord Romilly; and which decisions, the Master of the Rolls observed, he was bound to say, appeared to him to be so contrary to the current of previous authorities that even in the absence of *Evans v. Carrington* he should have arrived at the same conclusion. In the case of *Fitzgerald v. Chapman*, the marriage was dissolved on the petition of the wife by

Dissolution of marriage.
Wife's adultery.

Evans v. Carrington.

Fitzgerald v. Chapman.

(*k*) *Ante*, p. 111.

(*l*) 2 De Gex, F. & J. 481, following *Sidney v. Sidney*, 3 P. Wms. 269; *Blount v. Winter*, 3 P.

Wms. 276, n.; *Buchanan v. Buchanan*, 1 Ball & B. 203.

(*m*) L. R., 1 Ch. D. 563.

Husband's
adultery.

reason of the adultery of the husband, coupled with his desertion of his wife; and the trusts of the settlement, which was of property in which the wife and her father were jointly entitled, were, for the wife for her separate use without power of anticipation during the joint lives of her husband and herself, and, after her decease, for her husband for his life, and, subject to such trusts, in trust for the children of the marriage as therein mentioned, of whom there was only one, who died in infancy, so that this trust did not arise; and, if there should be no child who under the trusts should acquire a vested interest in the trust premises, then, after the death of the husband, they were to be held in trust for the wife absolutely if she should survive her husband, but if she should die in his lifetime, then in trust for such persons as she should by will appoint, and in default of appointment, in trust for her father, his executors, administrators and assigns. The wife commenced a suit against her husband for divorce, and the marriage was dissolved by the court; and the only child of the marriage, as I mentioned, died in infancy. The plaintiff, the wife, filed her bill against the trustees of the settlement and the executors of her father's will praying a direction that she was absolutely entitled to the trust property, and that the same might be conveyed and transferred to her absolutely. The ground of this suit was the notion that the dissolution of the marriage by the court was equivalent to the death of the husband, and that as, in case of his death, she would, under the trusts, have been undoubtedly entitled to the whole property absolutely, so the dissolution of the marriage had the same effect, and her bill was filed accordingly. But the Master of the Rolls dismissed the bill, holding that the dissolution of the marriage was a very different thing from the death of the husband, and that she would only be entitled to the property absolutely in case she sur-

vived her husband according to the literal meaning of the trusts of the settlement.

I shall in my next Lecture consider the subject of powers for the appointment of settled property amongst the issue of the marriage, and also the general subject of trusts for the benefit of such issue.

LECTURE X.

Husband's
right as
wife's admi-
nistrator to
her choses in
action.

Wife's choses
in possession.

ON going through the trusts of a settlement of real estate, converted into personalty by means of a trust for sale, we have discussed the first trust to arise after the marriage of the parties, namely, the trust to pay the income to the wife during the coverture for her separate use, without any power of anticipation. Upon the death of the wife, her husband, if he should survive her, will, on taking out letters of administration to her effects, be entitled to any part of the income which she may not have received, and also to an apportioned part of such income up to the day of her decease, provided that she has made no disposition thereof, either in her lifetime or by her will. For property which belongs to the separate use of a married woman absolutely, as arrears and savings do, must, if not disposed of by her, devolve according to law; and by the law, the husband of a married woman is, as her administrator, entitled to the whole of her personal estate which lies in action; and, as to such as is in possession, he is entitled thereto in his marital right, without the necessity of taking out letters of administration. I mentioned in my last Lecture (a) that, as it is impossible, except in the case of a married woman, totally to restrain alienation, so it is equally impossible to cause property given absolutely to devolve in any other manner than the law points out. If a married woman, therefore, is entitled to personal estate absolutely for her separate use, and dies without having disposed of it in her lifetime or by her will, the whole will belong to her husband on his taking out

(a) *Ante*, p. 136.

letters of administration to her effects, notwithstanding the strongest expressions, contained in the instrument of gift, that the same shall belong to her, without any control or interference of her husband. If it is wished that personal property, intended to be settled on a married woman for her separate use, should not go to her husband in case of her decease intestate, the only plan is, not to give it to the wife absolutely, but for her life only, and after her decease then to such persons and in such manner as she shall appoint by her will, and in default of such appointment, then in trust for her next of kin or any other persons, other than her husband, whom the settlor may feel proper to give it to. This we shall see is generally done in case the wife should die in the lifetime of the husband, and there should be no issue of the marriage.

Way to ex-
clude the
husband.

Life estate
only to wife.

With regard to apportionment the law upon this subject is now contained in the Apportionment Act, 1870 (b). Previously to this Act there had been, as that Act recites, divers statutes passed to remedy the inconveniences arising from the doctrine of the common law, that rents and some other periodical payments were not at common law apportionable, like interest on money lent, in respect of time. Interest on money lent was always considered as accruing from day to day, notwithstanding the fact, that in the deed of mortgage or other security for the money, payment of interest might have been reserved half-yearly. You may remember, that in ancient times, when the lending of money at interest was considered unlawful, one of the objections urged against the practice of usury, as it was then called, was, that it broke the Sabbath, by causing the money to work on Sunday, interest being payable for the use of the money every day, whether

Apportion-
ment Act,
1870.

Interest on
money lent.

(b) Stat. 33 & 34 Vict. c. 35.

- work day or Sunday. But other periodical payments were not considered to be apportionable in respect of time, but belonged entirely to the owner for the time being when the payment became due. This Act provides (c), that after its passing (which took place on the 1st of August, 1870), all rents, annuities, dividends and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing, or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
- Sect. 2.**
All periodical payments apportionable.
- Sect. 3.**
When apportioned part recoverable.
- Sect. 4.**
Remedies for recovery of apportionment.
- Sect. 5.**
Rents.
- The third section provides, that the apportioned part shall, in the case of a continuing payment, be recoverable when the entire portion, or rather payment, shall become due; and, in the case of an annual payment determined by re-entry, death or otherwise, then when the next entire portion or payment would have been payable, if the same had not so determined. The fourth section gives to all persons and their representatives the same remedies at law and in equity for recovering their apportioned parts, when payable (allowing proportionate parts of all just allowances), as they would have for recovering the entire portion or payment, if entitled thereto. But neither persons liable to pay rents reserved out of or charged on land, nor the lands themselves, are to be resorted to for any apportioned part; but the entire rent is to be received by the heir or other person who, if the rent had not been apportionable, would have been entitled thereto; and the apportioned part is to be recoverable from such heir or other person, by the parties entitled under the Act to the same. By the fifth section the word "rents" in the Act is construed to include rent service, rent charge and rent seek, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent

or tithe. A rent seek was a rent for which no distress could be made; but it is now practically non-existent, in consequence of a power of distress being now by statute incident to all rent-charges (*d*). The word "annuities" is construed to include salaries and pensions. And the word "dividends" is construed to include, besides dividends strictly so called, all payments made by the name of dividend, bonus or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times, or otherwise; and all such divisible revenue shall, for the purposes of the Act, be deemed to have accrued, by equal daily increment, during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made; but the word "dividend" does not include payments in the nature of a return or reimbursement of capital. By the sixth section nothing therein contained is to render apportionable any annual sums made payable in policies of assurance of any description. And by the seventh section the provisions of the Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place. It has been decided that this Act applies to a life estate under a will, dated before the passing of the Act, to which a codicil had been made after the Act (*e*); and it would seem that the result would be the same, whether there had been such a codicil or not. There appears to be nothing in the Act to prevent its operation retrospectively on life estates created before the passing of the Act, and coming to an end after its passing. And so in fact it has been decided (*f*).

Annuities.

Dividends.

Sect. 6.

Exception of annual sums payable in policies.

Sect. 7.

Express stipulation for no apportionment.

Act extends to life estates previously created.

(*d*) Stat. 4 Geo. II. c. 28, s. 5.

(*f*) *Re Thacker's Trusts*, V.-C.

(*e*) *Capron v. Capron*, L. R., 17 Eq. 288.

M., 21 W. R. 285; *In re Cline's Estate*, L. R., 18 Eq. 213.

Act applies to property to which deceased was entitled absolutely.

The Act applies not only to estates and interests which terminate by death, but also to property to which the deceased was absolutely entitled. Before the Act a devise of land or a bequest of stock to a person absolutely, carried the whole of the rent or dividend, as the case might be, which accrued next after the decease of the testator. But it is not so now. The executors of the deceased are entitled to an apportioned part of the income of the whole of his property, up to the date of his death, as part of his general estate; and a specific devisee or legatee is not now entitled to the whole of the accruing income which has become due next after the decease of the testator, but only to an apportioned part thereof. It is true that, under the fourth section of the Act, he receives the whole of the rent, in the case of lands let for rent, or the whole of the dividend, in the case of stock specifically bequeathed; but, having received it, he is bound to pay to the executors of the deceased an apportioned part of such rent or dividend, according to the time which the testator may have lived since the last payment of rent or dividend became due (g).

Where no apportionment intended.

The provisions of this Act are, by the seventh section, not to extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place. And the language used by the testator may be such as to show that he intended the whole of the next accruing rent or dividend to be paid to his devisee or legatee, without any deduction of any apportioned part, up to the time of the decease of the testator. An instance of expressions which were held sufficient to carry the whole of the dividends occurs in the recent case of *Jones v. Ogle* (h). In that case the testator bequeathed as follows:—"As to the share and interest

Jones v. Ogle.

(g) *Capron v. Capron*, L. R., 17 19 Eq. 271.
 Eq. 288; *Hasluck v. Pedley*, L. R., (h) L. R., 8 Ch. 192.

which I have in the Lilleshall Iron Company, I bequeath the dividends and income thereof to my uncle J. T. Ogle for his life, and after his death the same share and interest shall belong to his two daughters in equal shares." The Lilleshall Iron Company was a private trading partnership, and was not considered to be within the fifth section of the Act, which explains "dividends" to mean payments by the name of dividend, bonus or otherwise, out of the revenue of *trading or other public companies*. This was not a public company, and therefore not within that section. And, as the testator bequeathed not only his share and interest in the Lilleshall Iron Company, but also the dividends and income thereof, to his uncle for his life; it was held that the defendant J. T. Ogle was entitled to the whole of the dividends which were declared after the decease of the testator, though made in respect of profits, some of which accrued due in his lifetime.

The next trust in our settlement is a trust, after the decease of either the husband or the wife, to pay the income to the survivor of them and his or her assigns during his or her life. This gives to each of them a contingent reversionary interest for life in the income of the money to arise from the sale of the lands. This contingent reversionary interest of the husband, upon the chance of his surviving, may, like all other property, be disposed of by him as he may think fit. The contingent reversionary interest of the wife, on the chance of her being the survivor, may also be disposed of in the same manner as her interest in land may be disposed of, viz., by a deed executed by her, with the concurrence of her husband, and separately acknowledged by her as her own act and deed, under the provisions of the Act for the abolition of fines and recoveries, and for the substitution of more simple

Trust for survivor for life.

Wife's contingent reversionary interest,

conveyed by deed acknowledged.

Fine.

modes of assurance (i). Before this Act, it was held that a *fine* (k), levied by the husband and wife, of lands directed to be sold, was sufficient to pass the interest of a married woman entitled to a share of the purchase-money of such lands when they should be sold (l). Since that Act it has been holden that a deed acknowledged by the wife, with the concurrence of her husband, as I have just mentioned, is sufficient to pass all the wife's interest in the money to arise from the sale of land. The interpretation clause of the Act to abolish fines and recoveries defines the word *estate*, which is used in the Act, as comprehending any interest, charge, lien, or incumbrance in, upon, or affecting lands either at law or in equity. And the wife's reversionary interest for her life, in the income of the money to arise from the sale of land, is an interest in the land, and, as such, within the meaning of the Act. This was decided by Vice-Chancellor Wood, now Lord Hatherley, in the case of *Briggs v. Chamberlain* (m), followed by Lord Romilly, the late Master of the Rolls, in the case of *Tuer v. Turner* (n).

*Briggs v.
Chamberlain.*

*Tuer v.
Turner.*

Trust for
issue as hus-
band and wife
or survivor
shall ap-
point.

After the death of the survivor of the husband and wife, I mentioned that the usual trusts are for the issue of the marriage, in such manner as the husband and wife or the survivor of them shall appoint. The usual form of such a power is thus given in the third volume of Mr. Davidson's *Precedents in Conveyancing* (o):—"In trust for all, or such one or more, exclusively of the other or others, of the issue (whether children or more remote) of the said intended marriage, such remoter issue to be born during the lives of the said

(i) Stat. 3 & 4 Will. IV. c. 74;
Lectures on the Seisin of the
Freehold, pp. 111—113.

(k) Lectures on the Seisin of
the Freehold, pp. 106 *et seq.*

(l) *May v. Roper*, 4 Sim. 260;
Forbes v. Adams, 9 Sim. 462.

(m) 11 Hare, 69.

(n) 20 Beav. 560.

(o) Page 714, 3rd ed.

[*husband*] and [*wife*] or the life of the survivor of them, or within twenty-one years after the death of such survivor, at such age or time, or respective ages or times if more than one, in such shares, and with such future and executory or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for their respective advancement (either overreaching the interests prior to this power or not) or maintenance or education, at the discretion of the said trustees or trustee for the time being, or of any other person or persons, and upon such conditions, with such restrictions and in such manner as the said [*husband*] and [*wife*] shall by any deed or deeds, or writing or writings, sealed and delivered, with or without power of revocation and new appointment, jointly appoint; and, in default of such appointment and so far as no such appointment shall extend, then as the survivor of them shall in like manner or by will or codicil appoint." This is a very comprehensive power, and gives to the parents the utmost latitude that the law will allow. The provision that the remoter issue—that is, grandchildren or great grandchildren—to whom an appointment may be made, must be born during the lives of the parents or the survivor, or within twenty-one years after the decease of such survivor, is inserted upon the ground that an appointment beyond that period would be void as tending to a perpetuity, according to the doctrine which I endeavoured to explain in my previous Lectures of the present course (*p*).

It must always be borne in mind that, where a settlement is made on any marriage, containing a power to appoint the settled property to or amongst a class of persons then unborn, the property is tied up, or taken out of the power of general alienation, as from the date

In a marriage settlement the settled property tied up from the date.

Appointments
in favour of
grand-
children.

of the settlement by which the power is created, and not from the date of the instrument by which the power is exercised. This is a point of law too often forgotten; and parents, who have the power of appointing settled property amongst their children, are too apt to appoint the shares of their children to be held in trust for such children for their lives respectively, and after their decease then in trust for their children, the grandchildren of the appointors, sons at twenty-one, daughters at twenty-one or marriage. If the power, as in the case I have mentioned and which I am now discussing, authorizes an appointment to a grandchild, it can only be to a grandchild born during the lives of the parents, or the life of the survivor of them, or within twenty-one years after the decease of such survivor. It is obvious that an appointment to a child for life, and after his decease to his children generally who, being sons, shall attain twenty-one, or, being daughters, shall attain that age or marry, may carry the settlement further into futurity than is allowed by the rule against perpetuities. The son may survive the parent for more than twenty-one years; and his son may not be born till long after twenty-one years from the decease of his grandfather or grandmother. Such a provision, therefore, since it may possibly extend beyond the limit of perpetuity, is void altogether.

Power to ap-
point to chil-
dren, a
grandchild
not an object.

If the power should be, as it not unfrequently is, limited to an appointment amongst the children of the marriage, then an appointment to a grandchild or to grandchildren is void for another reason, namely this—that a grandchild is not an object of the power. The power must be strictly pursued; and a power to give property to a child of A. is not a power to give property to a grandchild of A. Such an attempted disposition would therefore be void on that account, namely—as being in excess of the appointment authorized by the

power. In this respect our law differs from that of Scotland, by which a power to grant provisions in favour of younger children is construed so as to extend to grandchildren (*q*).

The words "*such one or more exclusively of the others or other*" are now unnecessary by reason of an Act of Parliament passed on the 30th July, 1874, "to alter and amend the law as to appointments under powers not exclusive" (*r*). This Act recites that "by deeds, wills and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power which cannot be excluded." And it recites that "instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power, to the exclusion of the other or others or some other or others of such objects, and it is expedient to amend the law, so as to prevent such intended appointments failing." And it accordingly enacts (*s*), "that no appointment which, from and after the passing of this Act, shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded; but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property

As to exclusive appointments.

Stat. 37 & 38
Vict. c. 37.

Sect. 1.

Appointment not invalid because some object excluded.

(*q*) Sandford on Entails, p. 376.

(*s*) Sect. 1.

(*r*) Stat. 37 & 38 Vict. c. 37.

Exception
where amount
or share de-
clared.

subject to such power." "Provided always" (t), "that nothing in the Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

Substantial
share.

It follows from this Act of Parliament, that if I give property to A., B., and C. in such shares as D. shall appoint, D. may appoint the whole to A., to the exclusion of B. and C.; and if I wish this result not to arise, I must state the share from which no one of them may be excluded, or I may state that A., or B., or C. shall not be excluded from a certain share. Before this Act it was formerly held in equity that each child, under such a power, must have a *substantial share*. Then by Act of Parliament of 11th of George IV. and 1st of William IV. (u), this doctrine was abolished; and the appointment was good although an unsubstantial, illusory, or nominal share only should be given to, or left to devolve upon, any one or more objects of the power. And now Parliament has, as we have seen, gone further, and enacted that a power to appoint amongst all the children of the marriage will be validly exercised by an appointment to one or more of them only.

Power of re-
vocation and
new appoint-
ment.

There is another part of this power which is not strictly necessary, and that is the provision that the appointment may be by deed or writing sealed or delivered *with or without power of revocation and new appointment*. The parents, the donees of the power, may sometimes wish to change their minds; and, in that case, they reserve to themselves or the survivor a power of revocation and new appointment. I need

(t) Sect. 2.

(u) Stat. 11 Geo. IV. & 1 Will. IV. c. 46.

hardly say that if they should make an appointment, without reserving to themselves a power of revocation, they cannot afterwards revoke it. But it is not necessary to state in the original power that an appointment may contain a power of revocation. For if these words "with or without power of revocation and new appointment" were not inserted in the power, it would still be competent to the parents to make an appointment to any child, with a power reserved to themselves in such appointment to alter or revoke the same at their pleasure. It is unnecessary for them when making a revocable appointment to reserve, though it is usually done, a power to make a new appointment as well as a power of revocation. For if any appointment be made with a power of revocation, and that power of revocation is afterwards exercised, the appointment is at an end; and the original power to appoint is not gone or destroyed, as was at one time thought, but remains unaffected. The doctrine on this subject was established, after much difference of opinion, by the House of Lords, the ultimate court of appeal, in the case of *Saunders v. Evans* (x). In that case a landed estate was settled in 1794, on marriage, after the death of the survivor of the husband and wife, to such uses as the wife by deed, with or without power of revocation, or by will, should appoint. She then in 1830 exercised her power by a deed, which contained a power for her by deed to revoke and make a new appointment. In 1833 she executed another deed, revoking that of 1830 and newly appointing, and reserving to herself power by deed to revoke and newly appoint. This course was exactly repeated in 1835 by a deed of that date. In 1836 she executed another deed, simply revoking the deed of 1835. And in 1848 she made a will, reciting the power in the original settlement of 1794; and, by this

Revocable appointment may be made.

Power to re-appoint need not be reserved.

Saunders v. Evans.

(x) 8 H. of L. Cas. 721.

will, in exercise of the power thereby given, she appointed the estate to trustees for sale. And the question was, whether they could make a good title to the property. And it was held that they could; and that the consequence of the revocation in 1836 of the prior deed of 1835, was to revive the original power contained in the settlement of 1794, which was for the wife to appoint by deed or will. So that her will was held to be a valid execution of the power, and the title of the trustees under it was held to be good.

LECTURE XI.

Nor only is it competent to the donee of a power of appointment amongst children, or any other class of objects, to make an appointment subject to revocation, but it is also competent to the donee, if he thinks fit, totally to *extinguish* his power by a release thereof to the persons entitled in default of appointment. This was decided by Sir Thomas Plumer, Master of the Rolls, in the case of *Horner v. Swann* (a), following a decision of Sir John Leach, when Vice-Chancellor, in the case of *Smith v. Death* (b).

Extinguish-
ment of
power.

Horner v.
Swann.
Smith v.
Death.

In the case of *Horner v. Swann*, one William Horner devised his real and personal estate to trustees, upon trust for his wife during her widowhood, and after her decease or marriage, then in trust for such or all of his children *and their respective lawful issue*, and for such estates, &c. as his wife by will should devise and bequeath the same; and, in default of such will, in trust for all and every his children living at his decease or born in due time afterwards and their heirs respectively, share and share alike; with a gift over to the survivors in the event of any dying under twenty-one without leaving lawful issue. The testator left a widow and four children, all of whom attained twenty-one. One of them died subsequently leaving her eldest brother her heir-at-law. The widow and the three surviving children contracted to sell the devised estate; and the bill was filed by them for the specific performance of the contract. The purchaser by his answer submitted

Horner v.
Swann.

(a) *Turner & Russell*, 430.

(b) 5 *Mad.* 371.

that the plaintiffs could not make a good title, by reason of the widow's power of appointing by will to the children *and their respective lawful issue*; it being supposed that she could not extinguish her power. And, if this were the case, of course she might, notwithstanding the sale of the estate by herself and her children, have made an appointment of the whole amongst her grandchildren, and so have defeated the estate of the purchaser. But the Master of the Rolls decided that it was competent for the widow to release her power to appoint amongst her children or their respective lawful issue, by concurring in the deed of conveyance to the purchaser. And a specific performance of the contract was accordingly decreed.

Acknowledg-
ment by wife
of deed re-
leasing
power.

In this case the donee of the power was a widow and not under coverture. If the donee of the power is a married woman, then she cannot release such a power, affecting any estate or interest in land, otherwise than by a deed executed by her with the concurrence of her husband, and duly acknowledged by her as her own act and deed in pursuance of the 77th section of the Act for the abolition of fines and recoveries and for the substitution of more simple modes of assurance (c). But, by such a deed so acknowledged, this section of the statute expressly enacts that it shall be lawful for her to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or in regard to any estate in any lands of any tenure, as fully and effectually as she could do if she were a feme sole. I mentioned before (d) that any interest in the money to arise from the sale of land, comes within the definition of the word "estate" contained in the statute to which I have just referred.

(c) Stat. 3 & 4 Will. IV. c. 74; hold, pp. 111, 112.
Lectures on the Seisin of the Free- (d) *Ante*, p. 160.

It is curious to notice the strange differences that exist in our law, without any particular reason whatever so far as any one can see, between real estate and personal estate. If personal estate, not arising out of or being any estate or interest in land, should be settled on marriage, in the way that I have mentioned with regard to the settlement I am now going through, namely,—in trust, after the decease of the survivor of the husband and wife, for the children, or more remote issue of the marriage, in such manner as the husband and wife or the survivor may appoint, and, in default of appointment, in trust for the children equally, sons at twenty-one, daughters at twenty-one or marriage;—in this case it is impossible for the wife by any means to release her joint power of appointment, so long as she and her husband are both living. The law has not provided the same machinery with regard to a wife's personal estate as it has with regard to her real estate. This anomaly in our law was endeavoured to be remedied by Vice-Chancellor Sir Richard Malins, when in Parliament, by an Act of 20th and 21st of the Queen (*e*), intituled "An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate." But this Act expressly excepts (*f*) any interest in personal estate settled upon a married woman by any settlement or agreement for a settlement made on the occasion of her marriage. I believe that the bill as passed was considerably altered and cut down. If the instrument conferring upon a married woman any power of appointment over personal estate is not her marriage settlement, and has been made after the 31st of December, 1857, then this Act enables every such married woman to release or extinguish any power which may be vested in or limited or reserved to her, in regard to any such personal estate, as fully and effectually as she

Difference
between real
and personal
estate.

Wife's power
over personal
estate settled
on marriage.

Wife may
release power
over personal
estate not in
her marriage
settlement.

(*e*) Stat. 20 & 21 Vict. c. 57.

(*f*) Sect. 4.

Law as to re-
lease of
powers by
married
women.

could do if she were a feme sole (*g*). But her husband must concur in the deed; and the deed must be acknowledged by her in the same manner as is required by the Act to abolish fines and recoveries, for the acknowledgment of deeds relating to interests in land (*h*). The law, therefore, stands thus. If the subject of the power be real estate, or any interest in real estate, or if it be personal estate settled by an instrument made after the 31st of December, 1857, and not comprised in the married woman's marriage settlement, then she may release or extinguish any power over the same by deed, executed by her with the concurrence of her husband, and separately acknowledged by her. But if the subject of the power is personal estate unconnected with land, and either settled upon her by her marriage settlement, or settled by an instrument made on or before the 31st of December, 1857, then she is quite unable to extinguish or release any such power.

Trust for
children.

The next trust in the settlement is as follows:—"In default of any appointment, and so far as no such appointment shall extend, in trust for all the children or any the child of the marriage, who, being sons or a son, shall attain twenty-one, or, being daughters or a daughter, shall attain that age or marry under that age, and if more than one in equal shares." This gives no vested interest to any child, who, being a son, dies under twenty-one, or, being a daughter, dies under that age and unmarried. But it does give a vested interest to every son who attains twenty-one, whether in the lifetime of his parents or the survivor of them, or after the decease of such survivor, and also in like manner a vested interest to every daughter who attains twenty-one or marries under that age, whether in the

Vesting in
children, sons
at twenty-
one, daugh-
ters at
twenty-one
or marriage.

(*g*) Stat. 20 & 21 Vict. c. 57, s. 1.

(*h*) Sect. 2.

lifetime of her parents or of the survivor of them, or after the decease of such survivor. It was at one time thought, that, so long as a power of appointment existed in the parents, or in the survivor of them, the shares of the children could not be vested in them, on account of the uncertainty as to whether any child might not be totally or partially deprived of his share, by the exercise by his parents of their power of appointment in favour of some or one of the other children, either exclusively or partially. But it is now settled that the shares are vested in the children who, being sons, attain twenty-one, or, being daughters, attain that age or marry; but subject to be divested by the exercise of the power (i). It may be thought that there is little practical difference between the two; but in truth it is not so. When a share is vested, it is to all intents and purposes the property of the child, and may be sold, mortgaged, settled or bequeathed by him, subject, no doubt, all the while, to the whole vanishing by reason of the appointment of it to somebody else, under an exercise by the parents of their power of appointment. If the shares were contingent, nothing would vest in any child until the decease of the survivor of the parents, and those only of the children who were then living could claim anything. A child attaining twenty-one and dying in the lifetime of his parents would, in that case, be unable to transmit any share to his widow or children by settlement or will.

Shares vested subject to be divested by appointment.

If the trust should be simply for all the children of the marriage in equal shares, then every child would, on the moment of his birth, attain a vested interest, subject to be divested as to a proportionate part, from time to time, by the birth of every other child, by which, of course, each child's share is proportionably

Trust for all children equally.

(i) *Doe d. Willis v. Martin*, 4 T. Rep. 39.

reduced; and subject also to be entirely or partially divested by an appointment by the parents, or the survivor of them, to some other child. But the death of the child, if he has once attained a vested interest, does not divest his share, whether he dies a mere infant, or not till after he has attained his majority. The attaining of twenty-one may be made, as in the precedent which we are considering, the condition of vesting. But if it is not so made, and property is given so as to vest in infancy, the mere fact of the death of the infant will not divest it. For this purpose there must be an express clause that, on the decease of the infant under twenty-one, his share shall belong to someone else. Without such a clause the property passes on his decease to the administrator of his effects, if it be personal estate, either at law, or, as in the case we are considering, in equity only, by reason of a trust for sale of lands. If the share of the infant vested in him be real estate at law, or in equity only, by reason of a trust for the purchase of real estate with money settled, it will pass to the heir-at-law of the infant. And, whether the share be real or personal, the father, if living, will become beneficially entitled to his deceased child's share. If it be personal estate, he will be entitled to be administrator for his own benefit as his child's sole next of kin. If it be real estate, he will be entitled as his child's next heir-at-law under the Act to amend the law of inheritance (*k*).

Death of infant does not divest his interest.

Personalty passes to administrator.

Real estate passes to heir-at-law.

Vesting in children on birth subject to be divested on death under age.

A not unfrequent mode of settlement, and one which, in former days, was the more usual, was to vest the whole in the children at their birth, and if more than one in equal shares, with a gift over of any child's share to the other or others of them, in the event of such child, being a son, dying under twenty-one, or,

(*k*) Stat. 3 & 4 Will. IV. c. 106.

being a daughter, dying under that age, and without having been married; with a further gift also of any share or shares which may have accrued to the child by virtue of the death of any of his brothers or sisters, being sons under twenty-one, or being daughters under twenty-one and without having been married. The form of such a trust, with what are called cross-executory limitations, is as follows:—"In trust for all and every the child and children of the said intended marriage, and if more than one in equal shares. And in case of the decease of any such child or children, being a son or sons, under the age of twenty-one years, or, being a daughter or daughters, under that age and without having been married, then as to as well the original share or shares of the child or children so dying, as to the share or shares which may accrue to any such child or children under this present provision, in trust for the other or others of the said children, and if more than one in equal shares." This form vests the fund entirely in the child first born, and with it the whole of the income of the fund, subject to open and let in the other children, as they are born from time to time, to participate equally in the fund; and subject also to be totally or partially divested by an exercise by the parents, or the survivor of them, of their powers of appointment in favour of any other child or children.

Form of
trust.

So far as the corpus of the fund is concerned, the practical effect of the two modes of settlement is the same. No child takes any interest ultimately unless, being a son, he attains twenty-one, or, being a daughter, she attains that age or marries under that age. But, under the former mode of trust, the whole, both corpus and income, is in contingency until some son comes of age or some daughter comes of age or marries. Under the latter mode of trust the fund vests in the first child that is born; the whole of the income then belongs to

As to corpus
effect of both
modes is the
same.

As to income
effect differ-
ent.

such child, until another child is born to share it with him or her. Whereas, under the former mode of trust, the application of the intermediate income during the minority of the children has to be provided for by an express clause of maintenance, or by the Act of Parliament, to which I shall presently refer, which was passed with a view to providing for the maintenance of infants.

Hotchpot
clause.

Effect of
omission of
hotchpot
clause.

After the trust for the children of the marriage in default of appointment by the parents follows the *hotchpot* clause: "That no child who or whose issue shall take any part of the trust property, under any appointment in pursuance of either of the powers, shall, in default of appointment to the contrary, be entitled to any share of the unappointed part thereof, without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly." This clause should never be omitted; for, without it, any child to whom an appointment of a share may have been made, is entitled equally with the others, to whom no appointment may have been made, to a share of what remains unappointed. So that if the funds were 5,000*l.*, and there were five children, and 1,000*l.* were appointed to one of them, he, in the absence of the hotchpot clause, would be entitled to an equal share with the other four in the 4,000*l.* left unappointed, a course of division which generally would not be intended.

Death of
child after
twenty-one in
parent's life-
time.

Cannot be
appointee.

If any child should attain twenty-one and die in the lifetime of his parents, he will still have a vested interest under the trusts in default of appointment, in his share of the trust funds, equally with all the other children who being sons may attain twenty-one, or being daughters may attain that age or marry. But, by his death in the lifetime of his parents, he ceases to be within the power of appointment, which must be exercised only in favour of a child or children or other

issue living at the time of the appointment being made. And if the appointment should be by will, his death in the lifetime of the testator or testatrix will cause him to lose his appointed share by lapse. The child, therefore, *Lapse.* who dies in the lifetime of his parents, can only take in default of appointment, or under any appointment which may have been made to him by deed previous to his decease.

In like manner, if, on the marriage of any child, or otherwise, an independent provision should have been made for him, and he should have accepted such a provision in *satisfaction* of his share or interest under the marriage settlement of his parents, he will be struck out from the class of children to be provided for under the trusts and powers of that settlement. And the other children will become entitled to the whole, in the same manner as if he had never existed. There is a case of *Lee v. Head* (1), which illustrates this proposition. In that case, by a marriage settlement dated in 1790, lands were limited, after successive life estates to the husband and wife, to the use of all or such one or more of the child or children of the marriage in such manner as the husband should by deed or will appoint, and in default, as the wife, in case she should survive her husband, should appoint; and, in default of such appointment and subject thereto, to the use of the children of the marriage and of the several and respective heirs of their bodies as tenants in common in tail, with remainders over. There were issue of the marriage two children, a daughter, who married the defendant Head, and a son. By a settlement executed previously to the marriage of Mr. and Mrs. Head, her father settled on her and her children a sum of 6,000*l.*, which was agreed to be taken in full satisfaction of all her estate and in-

Satisfaction
of child's
share.

Lee v. Head.

(1) 1 Kay & Johnson, 620.

terest whatsoever under the settlement of 1790. The only son unfortunately became bankrupt, and the question was, what, under the circumstances, had become of the settled property after the decease of the husband and wife. And the court held that in consequence of a settlement having been made on the daughter in satisfaction of her estate and interest under the marriage settlement, she was barred of all estate and interest in the settled lands; and that the whole became vested in the son as tenant in tail, and so passed to his assignees under his bankruptcy. It was considered that the father, in making an advance to one child, intended to clear the settled property of the claim of that child for the benefit of the other child or children, so as to let such other child or children have the benefit of the advanced child's share.

Advancement
of part of
child's share.

After the trusts for children, there usually follows a power for the trustees, after the death of the survivor of the husband and wife, or in the lifetime of them, or of the survivor of them, with their, his, or her consent, to advance any part, generally not exceeding one-half, of the expectant or vested share of any child, in order to put him or her forward in the world. This power is very necessary; for, the fund being settled in trust for the separate use of the wife during the joint lives of herself and her husband without power of anticipation, she could not, without an express power of this kind, consent to an anticipation, on behalf of any child, of the trust in that child's favour.

Maintenance
of infant
children.

There is also usually inserted a provision for the maintenance of the infant children during minority; but this provision is not strictly necessary since the passing of the Act called Lord Cranworth's Act (*m*).

(*m*) Stat. 23 & 24 Vict. c. 145.

This Act provides (n) as follows:—"In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen. Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year." It was for some time doubted whether this clause applied to a case such as that of trusts, which I have just mentioned, for children who being sons should attain twenty-one, or being daughters should attain that age or marry. The trustees are authorized to apply the whole or any part of the income to which an infant *may be entitled*; and as, under such a trust, the infant is entitled to nothing until, being a son, he attains twenty-one, or, being a daughter, she attains that age or marries, it was doubted whether this clause could be relied upon as enabling the trustees, in such a case as this, to apply any part of the income

(n) Sect. 26.

In re Cotton.

of the expectant or presumptive share of the children of the marriage towards their maintenance and education. But all doubts upon this point have been set at rest, I trust, by the decision of the present Master of the Rolls in the case of *In re Cotton* (o). His lordship remarks: "The difficulty has arisen on the word 'entitled,' which is said to mean 'indefeasibly entitled;' and I agree that 'may be or become entitled' would have satisfied the conveyancers better. When property is held upon trust for an infant contingently on his attaining twenty-one, the infant is not entitled, strictly speaking, to the income any more than to the capital. If he attains that age he will get both." And his lordship was clearly of opinion that the trustees might apply for the maintenance of an infant a portion of the income of a fund settled upon trust for all the children of his father who should attain twenty-one. This is a liberal exposition of the Act, and carries out what was most probably the intention of those by whom it was framed. If the trust should be in favour of all the children on birth, with a divesting clause in the event of the death of sons under twenty-one, or daughters under that age and without having been married, then there is no question that the Act would apply.

Trusts in default of children.

Husband's property.

Wife's property.

In case there should be no child of the marriage, or none who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry, the trust, if the property settled is the husband's, is usually for him, his executors, administrators and assigns absolutely. But, if the settled property proceeds from the wife, the ultimate trust is usually for herself, her executors, administrators and assigns absolutely, in case she shall survive her husband; but, if she should die in his

(o) L. R., 1 Ch. D. 232. See for a distinction, *Re George*, L. R., 5 Ch. D. 837.

lifetime, then it is usual to give her a power to appoint the trust fund by will only, so as (a will being in its nature revocable) to prevent her from making any absolute appointment at the solicitation of the husband, which possibly she might afterwards regret. And in default of her making any appointment by will, it is usual to settle personal estate or money arising, as in the present case, from the sale of land, in trust for the persons who, under the statute for the distribution of the personal estate of intestates would be entitled thereto, in case she had died possessed of the fund intestate, and without having been married; such persons, if more than one, to take as tenants in common in the shares in which they would have taken under that statute. This takes the property back to the wife's next of kin in case she should die in her husband's lifetime without having made a will.

Trust for
wife's next of
kin.

This, you will observe, is a very different thing from giving property for the separate use of a married woman absolutely, with a gift over to other persons in case she should die without having disposed of the same in her lifetime or by her will. Such a gift over, we have seen (*p*), is absolutely void, being incompatible with the devolution, which the law prescribes, of the property of intestates. But here she has merely an estate for her life; and, in default of issue of the marriage, a power to appoint by will, in case she dies in her husband's lifetime; then, in default of such appointment, it is quite within the power of the settlor to declare the trusts of the property in favour of her next of kin or of any person or persons whom he may think fit.

(*p*) *Ante*, pp. 136, 137.

LECTURE XII.

Investment of
settled
moneys.

Consents
required.

THE next provision in the settlement, a provision sometimes inserted prior to the other trusts, is one for the investment of the money to arise from the sale of the lands, and for the alteration or variation of such investments. The investment, alteration, or variation is usually required to be made with the consent of the husband and wife during their joint lives, and of the survivor of them during his or her life, and, after the decease of the survivor, then at the discretion of the trustees or trustee for the time being of the settlement. The usual trusts for investment now inserted in settlements are much wider than was formerly the case. The old forms limited the investment to the parliamentary stocks or public funds, or government or real securities in England or Wales. But at the present day many other investments are frequently authorized; and one of the best forms of investment is that given by Mr. Davidson in the third volume of his *Precedents in Conveyancing* (a). This trust authorizes the investment of the moneys produced by the sale in the names or name, or under the legal control of, the trustees or trustee for the time being, in any of the public stocks or funds, or government securities of the United Kingdom or India, or any colony or dependency of the United Kingdom, or upon freehold, copyhold, leasehold or chattel real securities in England, Wales or Ireland, or in or upon the stocks, funds or shares, debentures, debenture stock, mortgages or securities of any corporation, company, or public body, municipal, commercial or

(a) Pages 546—550, 2nd ed.

otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom, but not in any other mode of investment. This form gives quite as wide a scope for investment as can be thought judicious. In the absence of any express provision as to investment, in former days the 3½. per cent. Consols were the only fund open to trustees for the investment of trust property; but, since that time, many changes have taken place; and money under the control of the Court, and all other trust money, is now authorized to be invested without special authority in Bank stock, East India stock, Exchequer bills, mortgage of freehold or copyhold estates in England or Wales, 3½. per cent. Consols, 3½. per cent. Reduced and New 3½. per cent. Annuities, and in some other securities specially authorized by particular Acts.

Investments
of money
under the
control of the
Court.

The old form of investment usual in Settlements was, as I have said, in the public funds of Great Britain, or at interest on government or real securities in England or Wales. *Real securities* are mortgages of freehold or copyhold estates. A mortgage of land held for a long term of years, as 500 years or more, without rent and without impeachment of waste, is generally considered a real security (b); but a mortgage of leasehold estates held subject to rent and covenants would not be considered as a real security within the meaning of this trust (c). With regard to the investment by trustees of money on mortgage, the rule is, that it is not prudent to invest more than about two-thirds of the value of landed property, and not more than half of the value of house property; and no trustee should invest money on mortgage without satisfactory evidence of the sufficiency of the security in this respect. The mortgage ought never to be a second

Real securi-
ties.

Not on a
second mort-
gage.

(b) See Lewin on Trusts, 288, 289, 6th ed.

(c) *Fuller v. Knight*, 6 Beav. 209.

Exception.

mortgage. But a charge under the Improvement of Land Act, 1864 (*d*), is, by the 61st section of that Act, not to be deemed such an incumbrance as to preclude a trustee of money, with power to invest the same in the purchase of land or on mortgage, from investing it in a purchase or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge. Such a provision is not usual; but, considering the amount of charges which may be made under this Act, it seems to me singular that it is not more frequently expressly provided in the terms of trust deeds, that the land on which the trust money may be lent by way of mortgage shall not be subject to any prior charge. The Act to further amend the law of property and to relieve trustees(*e*), provides(*f*), that when a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor or administrator, to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust; provided that such investment shall in other respects be reasonable and proper. This section, which was not originally retrospective, has been made so by statute 23 & 24 of the Queen, c. 38 (*g*). Although the 32nd section of the Act to further amend the law of property and to relieve trustees mentions any part of the United Kingdom, which of course includes *Scotland*, yet it is provided in the 33rd section of the same Act, that the Act shall not extend to Scotland. And I concur in the advice given by the late Mr. Lewin in his Treatise on

Mortgages in
Scotland.

(*d*) Stat. 27 & 28 Vict. c. 114.

(*f*) Sect. 32.

(*e*) Stat. 22 & 23 Vict. c. 35.

(*g*) Sect. 12.

the Law of Trusts (*h*), that it would not be safe for trustees to invest in Scotch securities till the construction of the Act has been sanctioned by some judicial decision. By a previous statute (*i*), trustees who are expressly authorized to lend on real securities in England, Wales or Great Britain, were empowered to lend on real securities in *Ireland*. But (*k*) all loans of money on real securities in Ireland under the Act, in which any minor or unborn child, or person of unsound mind, was or might be interested, were required to be made by the direction and under the authority of the Court of Chancery in England, to be obtained in any cause or upon petition in a summary way. But the statute which I have just mentioned (*l*) now precludes the necessity of an application to the court for the purpose of investing on real securities in Ireland, provided that such investment is not expressly forbidden in the instruments creating the trust.

Mortgages in
Ireland.

When a mortgage of leasehold property is authorized, it is not unusual to require that the lease of the property mortgaged shall be held for a term whereof not less than sixty years shall be unexpired. But, as a general rule, it is better not to fetter trustees too much, but to leave investments to their prudence and discretion; provided, of course, that prudent and discreet persons are appointed trustees.

Mortgage of
leaseholds.

I need hardly say that trustees must not lend their trust money on mere *personal security*, unless, indeed, they are expressly empowered so to do; and, even if empowered to lend on personal security, they ought not to lend the money to one of themselves. For the settlor, when he empowers trustees to lend money on personal

Trustees must
not lend on
mere personal
security.

Must not lend
to one of
themselves.

(*h*) Page 290, 6th ed.

(*l*) Stat. 22 & 23 Vict. c. 36,

(*i*) Stat. 4 & 5 Will. IV. c. 29. s. 32.

(*k*) Sect. 2.

security, must be taken to rely upon the united vigilance of all the trustees with respect to the solvency of the borrower. If, therefore, two out of the three trustees lend it to a third, the object is defeated and it is a breach of trust. This was decided in the case of an *Anonymous plaintiff v. Walker (m)*. If the trustees have power to lend on personal security with the consent of the tenant for life, they cannot lend their trust money to the tenant for life himself on his own personal security; but if trustees have power, with the consent of the tenant for life, to lend the money on real security, there is no objection to their lending the money on landed or house property of sufficient value belonging to the tenant for life.

Loan on mortgage to tenant for life.

Loan of stock on mortgage.

Trustees authorized to invest their trust money on real security have no right to lend a sum of stock, part of the trust funds, upon a mortgage of real estate, securing the re-transfer of the stock, and the payment of interest equal to the amount of the dividends on the stock. Such a mortgage may be very convenient to the mortgagor, but it is evidently of no benefit whatever to the persons beneficially interested in the stock. The tenant for life by such a mortgage gets no larger income; and the persons entitled to the corpus of the stock get the security of the mortgage premises in lieu of the security of the government, which is usually considered the best security.

Consent to change of securities when to be given.

Where a power is given to change securities with the consent of the tenant for life, such consent must always be given either prior to the proposed change or at the same time as the change of investment is made. The object of the power of control over the trustees thus given to the tenant for life, would of course be defeated,

(m) 5 Russ. 7.

if the trustees were enabled to make the change of investment in the first instance at their own discretion, and afterwards to apply to the tenant for life to consent to what had already been done.

A power to vary investments should always be inserted. Where there is not such a power, the Act of 22 & 23 Vict. c. 35 (*n*), to which I have already referred, does not authorize trustees, having money invested in the 3½ per cent. Consols, to sell out and invest the produce in East India stock (*o*). A power for trustees at their discretion to call in any trust fund invested in *any other* than the public funds or government securities, and to invest the same on any such securities, and from time to time at their discretion to vary such investments, is given by the 25th section of the statute 23 & 24 Vict. c. 145, commonly called Lord Cranworth's Act; but this Act extends only to settlements executed after its passing (*p*); and it contains no authority for trustees to vary securities for any other than the public funds or government securities.

When trustees may vary investments.

There is then a power to appoint new trustees, which may be shortly inserted by reference to the 27th section of the Act of the 23 & 24 Vict. c. 145, commonly called Lord Cranworth's Act. The persons nominated for the purpose of appointing new trustees are usually the husband and wife, or the survivor of them; and beyond that the power to appoint new trustees may be left to the operation of the statute, sect. 27, which is as follows:—"Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from, or refuse or become unfit or incapable to act in, the trusts or powers in him reposed, before the

Power to appoint new trustees.
Stat. 23 & 24
Vict. c. 145,
s. 27.

(*n*) Sect. 32.

(*p*) 28th August, 1860.

(*o*) *Re Ward*, 2 John. & Ham. 191.

same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or, if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall, with all convenient speed, be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery, either before or after the passing of the Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust."

Trustees appointed by Court, powers of.

That part of the above enactment which provides that every trustee appointed by the Court of Chancery, either before or after the passing of the Act, shall have the same powers as if he had been originally nominated a trustee, was inserted in consequence of its having been

held, that a trustee appointed by the Court of Chancery could not make a good title in exercise of a power of sale given to the trustees of a settlement of real property. The case in which this was decided was that of *Newman v. Warner* (q). There was in that case a settlement of real property, in which the legal estate was not given to the trustees, but to the husband and other beneficiaries successively; with a power for the two trustees, and the survivor of them, and the executors and administrators of such survivor, to sell and convey the property. It was there held that, although the court had undoubtedly authority to appoint new trustees of an instrument, where a proper case for the exercise of that jurisdiction is made out; yet here the question was, whether the court had power to alter the effect of a settlement made under the Statute of Uses. The Vice-Chancellor, Lord Cranworth, observed as follows:—"When the settlement was executed, the estates were to go in a course of legal devolution under the Statute of Uses, to certain persons for life, and to others in tail in succession; and the question is, how can that be got rid of? Why, by nothing but a stipulation by the parties themselves who made the settlement, that there should be a power to get rid of the uses. The getting rid of them is an act in derogation of what was done before; and a power for such a purpose must be always strictly pursued." . . . "Here the power was given to A. and B. and the survivor of them, and the executors and administrators of such survivor; and that power is now attempted to be exercised, not by A. and B. or the survivor of them, or the executors or administrators of the survivor, but by persons to whom the survivor has transferred the estates—transferred them, it is true, under the sanction of the court, and, therefore the parties claiming under the settlement cannot find fault with him for what he has

*Newman v.
Warner.*

Power to
alter settle-
ments under
Statute of
Uses.

(q) 1 Sim., N. S. 457.

done. But does that give to the parties to whom the property has been transferred a power which the parties to the settlement did not stipulate that they should have? My opinion is that, according to all authorities, it did not." The court, therefore, held that the trustees appointed by the Court of Chancery could not make such a title as a purchaser was bound to accept. I apprehend that this decision was quite in accordance with right principle; and, in consequence of this decision, it was enacted expressly that a trustee appointed by the Court of Chancery should have the same powers as a trustee originally nominated by the instrument creating the trusts.

Enactment in consequence of this decision.

The words in the 27th section which give to every new trustee to be appointed, *as well before as after the conveyance or assignment made to him*, the same powers as if he had been originally nominated a trustee, were inserted in consequence of its having been doubted whether a new trustee could act in any way, until the whole of the property had been duly conveyed or assigned. But this enactment, of course, sets the matter at rest in every case of an appointment of a new trustee by virtue of this section of the Act. And in other cases of the appointment of a new trustee otherwise than under this Act, it is now the better opinion, that a new trustee may act in the trust as soon as he is appointed; but of course he cannot convey or assign the trust estate until it shall have been first conveyed or assigned to him. If it should be wished to empower the husband and wife or any other person to appoint an *additional trustee* to act in the trust with those already appointed, an express power for that purpose must be inserted in the settlement. And conversely, if it should be wished that any trustee should have power at his own pleasure to refuse or decline to act further in the trust, without any new trustee being appointed in his place,

Trustee may act before conveyance to him.

Power to appoint an additional trustee.

Power for trustee to retire.

an express provision for that purpose should also be inserted. It rarely, however, happens that either one or the other of these powers is intended to exist.

When a trust is created, it is of course inexpedient that a single person should be a trustee; as the effect of such an arrangement is to give to such person the entire legal control over the trust property. If it be stock in the funds, he may sell it out; or if it be money on mortgage he may call it in, and spend it, if fraudulently inclined. It is better, therefore, always to have at least two trustees; but the form of a power to appoint new trustees which I have just read, and which was very much the same form of power as was inserted in ordinary settlements, authorizes the appointment of any person or persons to be a trustee or trustees in the place of the trustee or trustees dying, desiring to be discharged, &c. So that an appointment of two trustees in the place of one who may have died, or of one trustee in the place of two who may have died, is, I apprehend, strictly within the letter of the power; and the latter appointment, though inexpedient, yet, if made, would, I apprehend, be valid.

Number of trustees.

Better to have at least two trustees.

When a new trustee is appointed, the trust property must be conveyed and assigned so as to vest in the new trustee either solely or jointly with the surviving or continuing trustee or trustees as the case may require. The legal estate in land can only be conveyed in the manner required by law—formerly by feoffment, lease and release, bargain and sale, covenant to stand seised, fine or recovery, and latterly by deed of grant. But, as I mentioned before (*r*), the conveyance of landed property vested in trustees may, if one of them should die, be conveyed so as to vest in the new trustee and

Vesting trust property in new trustees.

(*r*) *Ante*, p. 72.

the surviving trustee jointly by means of a single deed operating under the Statute of Uses. The trustees having been joint tenants, on the death of one of them the whole of the land of which they were trustees survives to the other. A new trustee is appointed in pursuance of the power of appointment contained in the settlement. The surviving trustee grants the property to the new trustee and his heirs, to the use of himself the old trustee, and the new trustee, and their heirs, upon the trusts of the settlement or such of them as are then subsisting. The Statute of Uses carries the legal estate to the use; and thenceforward the surviving and new trustee become seised of the land comprised in the settlement as joint tenants in fee upon the trusts to which they are subject by virtue of the settlement.

**Powers of
new trustees**

The provision that every trustee to be appointed under the power shall have the same powers as if he had been originally nominated a trustee by the instrument creating the trusts is a very important provision. For in many cases, and particularly in those cases in which the legal estate is not vested in the trustees, but in the beneficiaries, the trustees have merely a power, such as a power of sale, given to them and the survivor of them, and, perhaps, to the executors or administrators of such survivor, as happened in the case of *Newman v. Warner*, to which I have just called your attention (s). Not only, therefore, must a new trustee be appointed, and not only must such estate as was vested in the old trustee be conveyed and assigned so as to vest in him jointly with the other trustee or trustees, but, as a power to appoint the use of property is a distinct thing from an estate and interest in property, and a distinct thing also from the power of disposition, which is by law incident to the possession of an estate or interest in

(s) *Ante*, p. 177.

property, it is necessary when in a settlement the trustees have certain powers of disposition vested in them, that every new trustee of the settlement shall, when appointed, possess the same power as he would have possessed if he had been originally nominated a trustee by the instrument which creates the trust.

It is provided by the Act further to amend the law of property and to relieve trustees (*t*), that every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say:—"That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipts for the sake of conformity; and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or discharge, out of the trust premises, all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument." Clauses of this kind had up to this time been usually inserted in trust deeds; but in truth they were rather declaratory of the law with respect to the respon-

Trustees' indemnity.

Re-imbursement of trustees.

(*t*) Stat. 22 & 23 Vict. c. 35, s. 31.

Wilful default, what is.

sibilities of trustees, than of any actual use in lessening the trustees' responsibilities; for the liability is qualified by the important words "unless the same shall happen through their own wilful default respectively." And if any trustee chooses, having confidence in his co-trustee, to leave to him the whole business of the trust, he will make a wilful default in his duty, which will render him liable for such acts and deeds of his co-trustee as may have been wrongfully done for want of his being looked after.

With regard to the power which the court has of appointing new trustees, in cases where it is inexpedient, difficult, or impracticable to do so without the assistance of the court, these are matters which seem to me rather to fall within the province of my learned colleague who lectures on Equity. And you will find these matters shortly stated in the chapter on Settlements in my Principles of the Law of Personal Property, and more at large in the late Mr. Lewin's valuable treatise on the Law of Trusts.

LECTURE XIII.

IN the last two or three Lectures I endeavoured to give a sketch of a marriage settlement of real estate, converted in equity into personal estate by means of a trust for sale. The whole legal estate in fee simple in the settled lands was vested in the trustees of the settlement, upon trust to sell them, with the consent of the intended husband and wife, or of the survivor of them, and after the decease of such survivor then at the discretion of the trustees or trustee for the time being of the settlement. The trusts of the money to arise from the sale were declared by another deed of even date made between the same parties. And it was declared, that until the lands should be sold the trustees should apply the rents and profits upon the same trusts as the income of the money to arise from the sale would be applicable, in case a sale of the lands and the investment of the purchase-money had actually been made. The trusts of the purchase-money were, shortly, for the separate and inalienable use of the intended wife during the joint lives of her husband and herself, with remainder in trust for the survivor of them during his or her life, with remainder in trust for the issue of the marriage in such manner as the husband and wife should jointly by deed appoint, or in default thereof as the survivor should appoint by deed or will. In default of and subject to any such appointment, the purchase-money or its investments were to be held in trust for the children of the marriage, in equal shares, sons at twenty-one, daughters at twenty-one or marriage. But no child to whom an appointment might have been made was to share in the unappointed portion of the

Recapitulation.

fund; without bringing his or her appointed share into hotchpot with the rest, and accounting for the same accordingly. Then followed powers for the maintenance and education of the children during their infancy, and for the advancement to any of them of a portion of their expectant or vested shares, before the same became actually payable. Provision was then made for the event of there being no child who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry. And a power for the appointment of new trustees, in the event of the death or retirement or incapacity of any trustee, brought the settlement to an end.

Settlement of
land on hus-
band, wife
and children.

I propose to devote the present and the next Lecture to an explanation of another mode of settlement of real estate, having substantially the same result, but effected in a different manner. The settlement is a real settlement (a), or a settlement of the land itself, and not a personal settlement, or a settlement of the money to arise from the sale of the land. The legal estate in the settled lands is vested as far as possible in the beneficiaries (b), and is not, as in the other settlement which I have just described, entirely vested in the trustees. The trustees act, when they do act, not in respect of the power which the legal ownership of the fee simple would confer on them, for they have no such legal ownership, but they act by virtue of powers or authorities expressly conferred upon them to do certain acts, and certain acts only, which may be necessary or expedient in the management of the trusts. When the parents are both dead and the children are all of age, and so the settlement is over, nothing remains vested in the trustees. The settlement itself has carried the lands to the children in such shares and for such estates

(a) See *ante*, p. 123.

(b) See *ante*, p. 63.

as the parents may have appointed, or, in default of any appointment, then to the children as tenants in common in fee in equal shares. Let us suppose that in this case the lands are the husband's. The settlement is made by indenture. The husband is of the first part, Parties. the wife of the second part, and the trustees of the third part. The deed recites that a marriage has been agreed Recitals. on and is intended to be shortly solemnized between the parties; and it then recites the agreement to settle made on the treaty for the marriage. It then wit- Testatum. nesses, that in pursuance of this agreement, and in consideration of the said intended marriage, the intended husband grants to the trustees and their heirs the lands in question, or the parcels, as they are termed, with their appurtenances, to hold the same unto the trustees and their heirs, to the use of the intended husband, his heirs and assigns, until the solemnization of the intended marriage, and after the solemnization thereof, to the uses agreed on. Here we have, as has often been remarked in previous Lectures(c), the Statute of Uses(d) brought into play. Until the marriage the lands forthwith revert in the husband by virtue of the use to him and his heirs; and the moment the marriage is solemnized they shift away from him, following the uses declared by the settlement, whatever they may be. In the present case the lands being the lands of the husband, the first use would be "to the use of the intended husband and his assigns during his life, without impeachment of waste." This use turns his former estate in fee simple into a mere estate for his life. The words "without impeachment of waste" are very material. I hope to explain them more at large in a future Lecture.

To the use of intended husband for his life.

After the life estate of the intended husband there

(c) Lectures on the Seisin of *ante*, p. 21.
 the Freehold, pp. 140, 141, 193; (d) Stat. 27 Hen. VIII. c. 10.

Trust to preserve contingent remainders.

formerly followed a limitation to the use of the trustees, their heirs and assigns, or their executors, administrators and assigns,—it was immaterial which,—during the life of the intended husband, in trust for him and his assigns, and to preserve the contingent remainders thereafter limited from being defeated or destroyed. The use to the trustees for the life of the intended husband was made to commence from and immediately after the determination of his own life estate by forfeiture or otherwise in his lifetime. This estate thus given to the trustees, by virtue of the use in their favour, was, as I endeavoured to explain in former Lectures (*e*), a vested estate, and not a mere contingent remainder. The object of the limitation was to preserve the contingent remainders to the unborn children of the marriage from being destroyed by the act of the tenant for life before they became vested estates. The law required that the seisin of the freehold should be kept up continuously, and never left without an owner. If the life estate should by any means have ceased before the contingent remainder became a vested estate, the contingent remainder was defeated or destroyed. The intervening estate of the trustees lasting as it did during the whole life of the husband, afforded an effectual support to every contingent remainder which became vested in his lifetime. But the Act to amend the law of real property (*f*) now enacts (*g*), as I have mentioned in a former Lecture (*h*), that a contingent remainder existing at any time after the 31st of December, 1844, shall be, and, if created before the passing of that Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of

(*e*) Lectures on the Seisin of the Freehold, pp. 189, 195; *ante*, p. 87.

(*g*) Sect. 8.

(*h*) Lectures on the Seisin of the Freehold, p. 197.

(*f*) Stat. 8 & 9 Vict. c. 106.

freehold, in the same manner in all respects as if such determination had not happened. Since this Act it is unnecessary to guard against the forfeiture, surrender, or merger of the husband's life estate. There is now no occasion to insert next after it another vested estate for his life, in order to support the contingent remainders, to the children of the marriage. They cannot now be defeated by the cesser of his life estate happening by any means during his life and whilst the remainders are still contingent. Should the life estate cease, whether by forfeiture, surrender, or merger, the contingent remainders are still safe under the shelter of the Act.

We pass on, therefore, to the next estate, which, in the present case, is "from and after the decease of the intended husband to the use of the intended wife and her assigns during her life, without impeachment of waste." The limitation in this form gives to the intended wife a *vested* estate for her life in remainder expectant on the decease of her husband. A very little alteration in the wording would give her, not a vested estate, but a contingent remainder only. Thus if the settlement should be worded as follows—"After the decease of the intended husband, *in case the said so-and-so his intended wife should survive him*, to the use of her and her assigns during the then residue of her life,"—here the intended wife would take only a contingent remainder and not an estate in remainder presently vested, though possibly never to come into possession. The criterion by which you may distinguish a vested estate from a contingent remainder is not the certainty or uncertainty of its ever coming into actual possession. It is this, a vested estate is one which is always ready at once to come into possession the moment the prior estate ends by any means whatsoever (i). Apply this

To the use of the intended wife for life.

A contingent remainder for life.

A vested estate.

(i) Lectures on the Seisin of the Freehold, p. 189; *ante*, p. 87.

Meaning of expression "after the decease of a tenant for life."

test, and you will see that, if you make the wife's estate not to commence until and unless she survives her husband, it cannot be a vested estate until and unless her husband dies in her lifetime. Should his life estate come to an end in his lifetime, the wife's estate, not being then in existence, cannot thenceforth come into possession. It may, however, be objected that the former form of limitation is equally contingent. It may be said that if the use, which is to carry the next estate to the wife for her life, is not to arise until "after the decease" of the husband, the estate of the wife must be contingent on her being alive at his death. The answer to this objection is, that the words "and from and after his decease," following a limitation of an estate for life, are the well-recognized and technical form of expression used for giving a vested estate in land, subject only to the prior life estate. These words do far more than confine themselves to what is to happen after the death of the first tenant for life. They give an immediate estate, which subsists during his life, and underlies his estate, as it were, and crops up to the surface the moment that his estate happens by any means to cease.

Limitation in favour of children.
Contingent remainders.

After the decease of the survivor of the husband and wife, or rather subject to their life estates, come the limitations in favour of the children. Now these limitations, so long as the children are unborn, are contingent remainders; and, having regard to the rule of the common law which requires a continuous seisin of the freehold to be provided for, it is necessary that these contingent remainders should be supported by a prior estate of freehold, to last until these contingent remainders become vested estates (*k*). If the limitations

(*k*) The Act to amend the law as to contingent remainders, stat. 40 & 41 Vict. c. 33, had not passed when these Lectures were deli-

vered. See Lectures on the Seisin of the Freehold, Appendix (B), p. 205.

be confined to the children of the marriage, then the life estate given to the husband will be sufficient to support them, as every child of the marriage must be born or begotten in the husband's lifetime. And by stat. 10 & 11 Will. III. c. 16, to which I adverted in a former Lecture (*l*), posthumous children are enabled to take as if they had been born in their father's lifetime. But if the limitations should include the children of the intended wife by any future marriage, then she or some other person or persons must have a vested estate of freehold for her life in order to support them. An estate for life is a freehold; but an estate for so many years, whether determinable on a life or lives or not, is not a freehold, but only a chattel interest, and cannot support a contingent remainder of an estate of freehold. You must, therefore, in all cases of this sort, avoid giving to the parent an estate for so many years, as ninety-nine years if he or she shall so long live. This form of limitation leaves the freehold undisposed of. The freehold ought always, by means of life estates, to be carried up to the point of time when the contingent remainders are to take effect in possession as vested estates.

Estate for years cannot support a contingent remainder of an estate of freehold.

An example of the failure of a contingent remainder to a child for want of attention to this rule occurred in the case of *Doe d. Mussell v. Morgan (m)*. The case was one of a will, but the principle is the same. One George Mussell, being seised in fee of the premises in question, made his will in 1727, and thereby devised them to his wife Elizabeth for her life, with remainder to his son Ebenezer Mussell for the term of ninety-nine years if he should so long live, and from and after the several deceases of his wife and son, then (in effect) to the children of Ebenezer Mussell. The testator died in

Example of failure of a contingent remainder.

Doe d. Mussell v. Morgan.

(*l*) Lectures on the Seisin of the Freehold, p. 199. (*m*) 3 T. Rep. 763.

1733. The widow died in 1741, in the lifetime of Ebenezer Mussell; after which Ebenezer married and had issue the lessor of the plaintiff. And it was held that under these circumstances the lessor of the plaintiff could claim no interest in the lands. The remainder to the children of Ebenezer Mussell was a contingent remainder, and required an estate of freehold to support it. If Ebenezer Mussell had died in the lifetime of the testator's widow, her life estate, being an estate of freehold, would have supported the contingent remainder to his children. But she died first, and when she died all support failed. The term of ninety-nine years, vested in Ebenezer if he should so long live, was a chattel interest only, and not a freehold. On the decease of the widow the freehold vested in the heir at law of the testator, who seems to have been this same Ebenezer, his son, who disposed of the premises in favour of the defendant. The contingent remainder came too late to displace the freehold already vested in the heir at law; and the intention of the testator was defeated. Had he given to his son Ebenezer an estate for his life instead of an estate for ninety-nine years determinable on his death, the freehold would have been carried on up to and beyond the time of the birth of his son the lessor of the plaintiff; and the contingent remainder in his favour would have taken effect as a vested estate in remainder during his father's lifetime, and in possession immediately after his father's decease.

In the settlement which we are now constructing, we have given a vested life estate in possession to the intended husband, and a vested life estate to the intended wife in remainder expectant on his decease. We now come to the limitations to the children. It is desirable to keep the children under the control of their parents by giving to the parents a power to appoint the property to the children or any one or more of them

in such manner as the parents may think proper. This power may run as follows: "To the use of the children of the said intended marriage, for such estate or estates, and if more than one, in such shares and proportions and generally in such manner as the intended husband and wife shall by deed jointly appoint, and in default of and subject to any such appointment, then as the survivor of them (and as to the intended wife notwithstanding any future coverture) shall by deed or will appoint."

Power to appoint to children.

In a former Lecture (n) I referred to the exercise by the husband and wife of a similar power over the money to arise from the sale of land converted in equity into personal estate by means of a trust for sale. I then warned you, in the exercise of such a power, to beware of transgressing the limits of perpetuity; as no appointment could be good in this respect which would not have been valid if inserted in the original settlement (o). But in the exercise of a power which deals with the legal estate in freehold lands, there is another and a distinct danger to be guarded against, namely, that of creating a contingent remainder which may fail altogether from want of being sufficiently supported by a prior estate of freehold. An instance of such an unfortunate exercise of a joint power of appointment occurs in the recent case of *Cunliffe v. Brancker*, decided first by the present Master of the Rolls and afterwards by the Court of Appeal (p).

Exercise of power to appoint to children.

Creation of contingent remainders by appointment.

In the case of *Cunliffe v. Brancker* the appointment was made in pursuance of a power contained in a will. The testator, Edmund Leigh, by his will, dated in 1814, devised a moiety of his real estates to two trustees, their heirs and assigns, to the use of the same two

Cunliffe v. Brancker.

(n) *Ante*, p. 150.

(p) L. R., 3 Ch. D. 393.

(o) *Ante*, p. 151.

trustees, their executors, administrators and assigns, for the term of 120 years next after his decease, if the testator's niece Sarah, the wife of John Cunliffe, should so long live, but upon the trusts thereafter mentioned concerning the same; and from and after the expiration or sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of the said John Cunliffe and his assigns during his life, without impeachment of waste; and after the determination of that estate by any means in his lifetime, then to the use of the trustees and their heirs during the life of the said John Cunliffe, upon trust to preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and from and immediately after the decease of the said John Cunliffe, to the use of all and every or such one or more of the child or children of the said Sarah Cunliffe, lawfully to be begotten, *who should be living at her decease*, as they, the said John Cunliffe and Sarah his wife, during their joint lives, by any deed or instrument in writing, with or without power of revocation, to be by them executed as therein mentioned, should from time to time appoint; and in default of such joint appointment, then as the survivor of them, the said John Cunliffe and Sarah his wife, should, by any deed or instrument in writing, with or without power of revocation, to be executed as therein mentioned, or by his or her last will or codicil appoint, give or devise the same; and in default of such appointment, gift or devise by the said John Cunliffe and Sarah his wife, or the survivor of them, to the use of all and every the child and children of the said Sarah Cunliffe, lawfully to be begotten, *who should be living at the decease of the survivor of them*, the said John Cunliffe and Sarah his wife, and the issue of such of them as should be then dead, leaving lawful issue *then living*, (such issue respectively to have and take, and if more than one equally amongst them, the

part or share only which his, her, or their parent or parents respectively would have taken and been entitled to, if living at the decease of the survivor of them, the said John Cunliffe and Sarah his wife,) and the several and respective heirs and assigns of such child, children, and issue for ever as tenants in common. The above-mentioned term of 120 years was declared to be limited to the trustees, their executors, administrators and assigns, upon trust during the said term to pay the clear yearly rents and profits of the premises therein comprised unto the testator's niece, Sarah Cunliffe, and her assigns, for her separate use. The testator died in 1817, leaving Sarah Cunliffe and another niece his co-heiresses at law. John Cunliffe died on the 7th of July, 1871. Sarah Cunliffe survived her husband, and died on the 9th of December, 1873. But John Cunliffe and Sarah his wife in the year 1866 executed a deed of appointment under their hands and seals, whereby, by virtue and in exercise of every power given to them by the will of the said Edmund Leigh, they appointed that all the hereditaments and real estate, and moieties, parts, or shares of hereditaments and real estate devised by the said will, should (subject to the estate and interests limited or created therein prior to the limitation or creation and operation of the powers intended to be thereby exercised) go, remain, and be to the use of all and every or such of their six children therein named *who should be living at the decease of their mother, Sarah Cunliffe*, their, his, or her heirs and assigns, in equal shares as tenants in common.

You will see that the first estate created in the moiety in question of the lands devised by the will was a term of 120 years vested in the trustees, if Sarah Cunliffe should so long live, in trust for her, for her separate use. This term continued until her death, which happened on the 9th of December, 1873. But it was not an estate

*Remarks on
Cunliffe v.
Brancker.*

of freehold; it was only a chattel interest; and as such it was incapable of supporting a contingent remainder (q). Subject to this term the freehold in the moiety in question was limited to John Cunliffe during his life. But John Cunliffe died in 1871, in his wife's lifetime; and from the time of his death to the death of Sarah his wife, in 1873, the freehold was undisposed of, and consequently descended to the co-heiresses at law of the testator. The appointment which was made by John Cunliffe and Sarah his wife was only to such of their children as should be living at the decease of Sarah. And in truth it could not have been otherwise; for the power of appointment contained in the will authorized an appointment only to such of her children as should be living at her decease. The appointment, therefore, could vest no estate in any child until the decease of Sarah Cunliffe. But it was then too late. A fee simple once vested in an heir at law or any one else cannot be divested otherwise than by a springing or shifting use in a deed or by an executory devise in a will. And in the present case the estates given to the children by the appointment could not be upheld as executory devises; because it is an invariable rule that whenever any limitation can in any event take effect as a remainder, it shall not be allowed to take effect as an executory devise (r). And as John Cunliffe was living, the estates appointed to the children would have taken effect as remainders had he survived his wife. The result therefore, unfortunately, was that the estates intended to be given to the children by the appointment fell to the ground for want of an estate of freehold to support them.

The appointment being thus inoperative, the moiety in question passed as if no appointment had been made.

(q) *Ante*, p. 189.

(r) *Ante*, p. 24.

But here again the same difficulty recurred. The moiety in question was limited, after the decease of John Cunliffe and in default of a joint appointment, to the use of such of the children of Sarah Cunliffe who should be living at her decease as the survivor of them the said John Cunliffe and Sarah his wife should by deed or will appoint. This power was not exercised. Now if Mrs. Cunliffe had made such an appointment after the decease of her husband, it is obvious that the estates limited by such an appointment could not have become vested estates during her husband's lifetime, and so could not possibly have been, under any circumstances, remainders to take effect on the expiration of a prior estate of freehold. Under these circumstances the law, in its indulgence to testators, would have allowed the gifts to take effect by way of executory devise; and the children would thus not have been deprived of the estates intended for them. But, as I said before, this power was not exercised.

In default of appointment by the survivor of Mr. and Mrs. Cunliffe the moiety in question was, as we have seen, limited to the use of the children of Sarah Cunliffe who should be *living at the decease of the survivor of them the said John Cunliffe and Sarah his wife*, and the issue of such of them as should be then dead leaving lawful issue then living. None appear to have died leaving issue. Here again was a contingent remainder unsupported by any previous or particular estate of freehold, from the moment that John Cunliffe died in the lifetime of his wife. This remainder therefore failed also.

There was still another remainder in the will in favour of other persons. But this remainder was, like the others, contingent on an event which could not be ascertained until the decease of the survivor of Mr. and Mrs. Cunliffe. It was an alternative limitation in the

event of there not being any child or issue of any child of Sarah Cunliffe *living at the decease of the survivor of them the said John Cunliffe* and Sarah his wife. The death of the survivor of them must obviously happen before this contingency could be ascertained. This contingency might have happened in such a way as to cause the limitation to take effect as a vested remainder. If John Cunliffe had survived, and at his death there had been no child or issue of a child then living, this remainder over would have taken effect as a vested remainder immediately on his decease. But when he died in his wife's lifetime, it became impossible that it should take effect at all; and indeed the event did not happen. Every remainder therefore failed; the will came to an end; and the co-heiresses at law of the testator, or those claiming under them, were held to be entitled to the property.

This case teaches two lessons. First, always support your contingent remainders of estates of freehold at law by a sufficient legal estate of freehold to last till the contingent remainders become vested estates. And secondly, when you exercise a power of appointment giving any such contingent remainders, take care that your remainders so closely fit in to the prior estates of freehold already existing in the same premises, as to leave no possible gap of time between them.

I hope in my next Lecture to go on with this subject, and to bring to an end my remarks on a settlement of real estate on a husband and wife and their children generally. Settlements of land in which the eldest son takes the whole, subject to portions for the younger children, must be reserved for a future Lecture.

LECTURE XIV.

IN my last Lecture we got as far in the construction of our settlement as a limitation, after the decease of the survivor of the intended husband and wife, to the use of the children of the marriage, as the parents or the survivor shall appoint. We now come to the limitations to the children in default of appointment, or subject to any partial appointment. These limitations require some care. Whatever they may be, they must at all events be vested estates, to take effect in possession immediately on the decease of the survivor of the husband and wife. It will not do, therefore, in this case to make the limitation to correspond with that which I mentioned in a former Lecture (*a*) as a proper and usual form of the trust of money to arise from the sale of land; namely, in trust for all the children, who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry under that age. This, in a trust of money, is all very well. And if the legal estate were vested in the trustees, so that the interests to be taken by the children should be entirely of an equitable nature, and not estates at law, the trust might also be expressed in the same way. For it has been held in equity that a contingent remainder of a merely equitable estate of freehold does not require to be supported by a prior equitable estate of freehold lasting till the contingent remainder becomes vested. This was decided by Lord Hardwicke in the case of *Hopkins v. Hopkins* (*b*), to which I drew attention in a former Lecture (*c*). The doctrine relates only to

Limitations
to children in
default of ap-
pointment.

Must be
vested estates.

Contingent
remainder of
equitable
estate re-
quires no
support.

(*a*) *Ante*, p. 160.

(*c*) *Ante*, pp. 24—29.

(*b*) 1 Atkyns, 580.

*Festing v.
Allen.*

legal estates. But in dealing with the legal estate, if you give it only to such children as attain a given age, and no child has attained that age when the prior estates cease by the death of the surviving parent, the result will be that the whole will fail. Of this an example occurs in the case of *Festing v. Allen* (*d*), which I also mentioned in a former Lecture (*e*). There the gift was by will to the use of Martha H. Johnson for her life, with remainder to the use of all her children who should attain twenty-one, as tenants in common in fee. At the death of M. H. Johnson no child of hers had attained twenty-one; and the whole gift to her children was held to fail, because at the moment of her death there was no child ready to step in and take the freehold.

*Brackenbury
v. Gibbons.*

Even had there been a child of the prescribed age at the death of the tenant for life, still the intention of the settlor would be defeated unless all the children should happen to have attained the prescribed age in the lifetime of the parent. For if some only of the children have attained the prescribed age when the freehold falls in, those and those only will take the lands settled between them, and the others will take nothing. An example of a failure of intention from this cause occurred in the recent case of *Brackenbury v. Gibbons* (*f*), decided by Vice-Chancellor Hall. That was also the case of a will. The testator by his will, dated in 1854, devised lands to his daughter H. Nundy for her life, and after her decease he gave the same unto the child if only one, or all the children if more than one, of his said daughter who should attain twenty-one or die under that age leaving issue at his, her, or their respective deaths, in fee simple, and if more than one as tenants in common. And in case there should be no child of the said H.

(*d*) 12 Mee. & Wels. 279.

the Freehold, p. 200.

(*e*) Lectures on the Seisin of

(*f*) L. R., 2 Ch. D. 417.

Nundy who should attain the age of twenty-one years or die under that age leaving issue, then he gave the same hereditaments unto the child if only one, or all the children if more than one, of his daughter E. Gibbons, who either before or after her death should attain the age of twenty-one years or die under that age leaving issue living at his, her, or their death or respective deaths, in fee simple, such children if more than one to take as tenants in common. The testator died in 1857. H. Nundy died in 1864 without having had a child. At her death two children only of E. Gibbons had attained the age of twenty-one years; but there were other children of E. Gibbons who attained twenty-one after the decease of H. Nundy the tenant for life. The Vice-Chancellor held that the two children who had attained twenty-one at the death of the tenant for life took vested interests, and that they alone were entitled, to the exclusion of the children who did not attain twenty-one until after the decease of the tenant for life.

The estates of the children ought therefore to be so given as to be vested at or before the decease of the last tenant for life. The estates may be either in fee simple or fee tail. Let us take, first, estates in fee simple. These estates may be limited as follows:—
 “To the use of all and every the child and children of the said A. B. (the intended husband) by the said C. D. (the intended wife), and his, her and their heirs and assigns for ever, and if more than one in equal shares as tenants in common.” This vests the property in the first child who may be born for an estate of inheritance in fee simple in remainder expectant on the decease of his or her parents. Should another child be born, the estate of the elder child is said to open, so as to let in the second child. And thenceforward the two children have vested remainders in fee in the premises in equal

To children
as tenants in
common in
fee.

Whole vests
in first-born
child.

Open to let
in after-born
children.

shares as tenants in common, in remainder expectant upon the decease of their parents. But these estates open again every time that a fresh child is born, until the number of children is completed, an event that must happen before the parents are both dead. The children then, whatever may be the number of them, take vested estates in fee simple in remainder, in equal shares as tenants in common.

Provision for
death of
children in
infancy.

But this alone is not sufficient. A child may die in infancy. If the limitation stood as I have stated without anything further, the result would be that his or her share would, under the Act for the amendment of the law of inheritance (*g*), descend to his or her father, if living, as his or her heir at law. Or, if the father were dead, then the share of the infant would descend to his or her eldest brother as heir, to the exclusion of the younger brothers and of the sisters. In order to remedy these inconveniences, it is usual to provide that the share of a child so dying, being a son under twenty-one, and being a daughter under twenty-one and without having been married, shall go to the other children as tenants in common in fee in equal shares. And as it is obvious that more than one child may possibly so die, it follows that a child dying in infancy may have not only his or her original share under the settlement, but also one or more shares accrued to him or her by reason of the previous death of some brothers or sisters also in infancy. These accruing shares should also be carried over to the other children, as well as the original share of each child so dying. All this may be accomplished by the following clause:—"And in case any one or more of the said children, being a son or sons shall depart this life under the age of twenty-one years, or being a daughter or daughters shall depart this

Accruing
shares.

Form of cross
limitations
amongst the
children.

(*g*) Stat. 3 & 4 Will. IV. c. 106. See *ante*, p. 162.

life under that age and without having been married, then as to as well the original share or shares of the child or children so dying as the share or shares which may accrue to him, her, or them under this present clause, to the use of the other or others of the said children, his, her, or their heirs and assigns for ever, and if more than one in equal shares as tenants in common."

Now this gift to the other children, thus engrafted on the estate in fee limited to the use of each child, is not by way of remainder either vested or contingent. It operates so as to defeat and destroy in a given event, namely, death in infancy, the estate originally vested in the child by virtue of the limitation in the child's favour of a use in fee simple. This limitation over is an example of a springing or shifting use, which may have effect in a deed when lands are conveyed to one or more persons and their heirs to uses turned into legal estates by virtue of the Statute of Uses. A similar limitation in a will, with or without the intervention of uses, may also take effect by way of executory devise. But in a deed at the common law, when the Statute of Uses is not employed, no such effect can be produced. At the common law an estate once vested must remain, and cannot be defeated, except by a condition of which only the grantor or his heirs can take advantage (*h*). In our settlement, however, we have availed ourselves of the Statute of Uses, and the effect of this shifting of the estates away from all who die in infancy will be that ultimately the whole will accrue to those only who being sons attain twenty-one, or being daughters attain that age or marry.

Cross limitations after estates in fee are by way of shifting use.

In the limitation which I have just read the phrase

(*h*) *Ante*, p. 21.

Other or
others not
survivors or
survivor.

"to the use of the other or others of the said children," is more accurate than the phrase "to the use of the survivor or survivors of the said children." Those who are intended ultimately to take the whole are always others, but they are not necessarily survivors. Thus a son may attain twenty-one and die during the minority of some other child. His infant brother or sister may then die in infancy; and a share of the share of such infant brother or sister is intended to pass to each of the sons who has then already attained twenty-one, whether then living or not, in addition to those who may thereafter attain that age. The accruing shares ought to be expressly limited over along with the original shares, in order to avoid all doubts; although a benignant interpretation may, in some cases, perhaps read the word "shares" as comprising all shares, whether original or accruing.

Accruing
shares.

To children
as tenants in
common in
tail with
cross-re-
mainders.

Another not unusual mode of limitation is to give the children estates in tail (*i*) as tenants in common, with cross-remainders among them on the death and failure of issue of any child, to the use of the others as tenants in common in tail. The advantage of this plan is, that in case a child attains twenty-one and then dies without issue, and without having barred the remainders over, which he may do with the consent of the tenant for life as protector (*k*), his share will accrue to the other children in equal shares; whereas, had his estate been an estate in fee simple, according to our former plan (*l*) it would have been disposable by the child, when of age, either by deed or by his will, and in default of any such disposition it would have descended on his father, if living, as his heir at law, or, if the father were dead, then on the eldest brother as the next heir at law. The disadvantage of the plan is, that no

(*i*) See Lectures on the Seisin of the Freehold, pp. 150 *et seq.*

(*k*) *Ibid.*, pp. 161, 173 *et seq.*

(*l*) *Ante*, p. 199.

child can dispose of his or her share for an estate in fee simple without the expense of a deed enrolled in the Chancery Division of the High Court under the Act for the abolition of fines and recoveries and for the substitution of more simple modes of assurance (*m*). If the estate tail is still in remainder, the consent of the first tenant for life or for years determinable on life under the same settlement must be obtained in order to do more than bar the issue of the tenant in tail (*n*). Such tenant for life or for years determinable on life is the protector of the settlement; and without this consent of the protector, the remainders over expectant on the determination of the estate tail cannot be barred. But if the estate tail is in possession so that there is no protector, the tenant in tail may by himself convey the fee simple of his own share, just as if he were seised in fee; the deed being always enrolled in the Chancery Division of the High Court within six calendar months after its execution. I explained this subject more at large in my 10th and 11th Lectures on the Seisin of the Freehold (*o*).

Disadvantage
of this plan.

Consent of
protector.

The limitation to the use of the children as tenants in common in tail with cross-remainders may be in the following form, which you will note extends as well to any shares which may accrue as to the original share of each child:—"To the use of all and every the child and children of the said A. B. (the intended husband) by the said C. D. (the intended wife) and the heirs of his, her and their body or respective bodies, and if more than one in equal shares as tenants in common. And in case of the failure of the issue of any one or more of the said children, then as to as well the original share or shares of the child or children whose issue shall so fail as to the share or shares which may accrue to him,

Form of limitation to children as tenants in common in tail with cross-remainders.

(*m*) Stat. 3 & 4 Will. IV. c. 74. the Freehold, pp. 181, 182.

(*n*) Lectures on the Seisin of (*o*) *Ibid.*, pp. 149, 169.

her, or them, or the heirs of his, her, or their body or respective bodies, under this present clause, to the use of the other or others of the said children and the heirs of his, her, and their body or respective bodies, and if more than one in equal shares as tenants in common." The following words may also be added: but they are more by way of explanation than absolutely necessary. "And if all the said children but one shall die without issue, or there shall be but one such child, then, as to the entirety of the said premises, to the use of such one or only child and the heirs of his or her body."

Cross-re-
mainders of
estates tail
are strictly
remainders.

This clause, as you see, is very similarly worded to the limitation over of estates in fee simple in the event of any child dying, being a son under twenty-one, or being a daughter under twenty-one and without having been married (*p*). But cross-remainders of estates tail are remainders in the strict sense of the word. The limitation of a cross-remainder does not defeat, or destroy, or lessen in any way the original estates in tail previously limited. If a child to whom an estate in fee simple has been given dies at the age of seven years, his estate in fee simple remains and descends to his heir at law, unless it is cut short by a shifting use in a deed, or by an executory devise in a will. But if a child to whom an estate in tail has been given dies at the age of seven years, his estate tail *ipso facto* ceases, he having left no issue to inherit it. And a remainder may consequently be added to take effect on the determination of an estate tail. Where there are cross-remainders in tail, each living child has a vested estate tail in his own original share, and also a vested estate tail in remainder expectant on the decease and failure of issue of every other child in a share, according to the number of children, of the share of every other child. The effect

of a clause of cross-remainders of estates tail may also possibly last for ages. If any child has issue, his estate, if not barred by any disentailing deed, goes on and descends to his issue to all generations, according to the rules of inheritance. When his issue are all dead, but not before, the estate tail comes to its natural termination; and the next estate in remainder then becomes an estate in possession. The usual words for creating a vested remainder next after an estate tail are "in default," or "for want," or "on failure" of such issue. Thus a limitation to the use of A. and the heirs of his body, and for want of such issue to the use of B. and his heirs, gives to B. a vested estate in fee simple in remainder immediately expectant on the determination of A.'s estate tail. But this remainder, though a vested estate, is liable to be cut off and barred or destroyed at any moment by A. executing a disentailing deed duly enrolled under the Act for that purpose.

Cross-remainders may last for ages.

Words used for creating a vested remainder after an estate tail.

It is a rule that in a deed cross-remainders in tail must be expressed and cannot be implied, whilst in a will they are often implied, when such an implication would carry out the apparent intention of the testator. But although this rule is well established, yet the expressions in a deed may be more or less distinct. And in a modern case the Court of Exchequer held expressions in a deed to be sufficient to carry shares that had accrued, as well as original shares, by way of cross-remainder; overruling a prior decision of Sir John Leach, when Master of the Rolls, who took a more strict view of this rule of construction. The case in the Exchequer to which I refer is that of *Doe d. Clift v. Birkhead* (q). And the case which it overruled is that of *Edwards v. Alliston* (r).

Cross-remainders not implied in a deed.

Doe v. Birkhead.
Edwards v. Alliston.

(q) 4 Exch. 110.

(r) 4 Russ. 78.

Hotchpot in-
appropriate.

A clause of hotchpot (*s*), which is appropriate and easily worked where the settlement is of money or stock, is not so appropriate in a settlement of land not directed to be sold, and should be omitted. But in this case it should be borne in mind, in the event of the exercise by the parents, or the survivor of them, of their powers of appointment in favour of any child, that he or she will be entitled, in addition to what has been appointed to him or her, to an equal share with the other children in the part that remains unappointed. A power of advancement of any part of a settled fund, for the purpose of putting any child forward in the world, is evidently a very appropriate provision in the settlement of money or stock. But it is inappropriate in a settlement of land; as a share in a landed estate cannot be applied for the purpose intended, otherwise than by being used for raising money by mortgage or sale. The maintenance of the children during their minority may properly be left to be taken care of by the 26th section of Lord Cranworth's Act, to which I adverted in a former Lecture (*t*).

Advance-
ment.

Maintenance.

Limitation
over in de-
fault of
children.

We now come to the limitation over in case there should be no child of the marriage, or none who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry under that age. In the present case the property settled being supposed to be that of the husband, the limitation would simply be to the use of the husband, his heirs and assigns for ever. But the nature of this limitation is very different in the two examples of a settlement which I have given; namely, first, in a settlement where the children take estates in fee simple, with cross limitations by way of shifting use to the other children, in the event of

Difference
where child-
ren take es-
tates in fee
and where
they take
estates tail.

(*s*) *Ante*, p. 164.

(*t*) Stat. 23 & 24 Vict. c. 145; *ante*, p. 167.

any child dying under a given age, as twenty-one, or under given circumstances, as under twenty-one and without having been married; and secondly, where the children take as tenants in common in tail, with cross-remainders amongst them. The nature of the limitation over in these two different cases will be best explained by supposing the limitation to be, not to the use of the husband, the author of the settlement, but to the use of X., a stranger, his heirs and assigns.

In the first case, where estates are limited to the use of the children in fee simple, with cross-limitations by way of shifting use amongst them, it is evident that until a child is born the estates of the children are contingent remainders in fee. And the remainder to X. is equally contingent; for it cannot vest until it is known for certain that there will be no child of the marriage. And this cannot be known so long as both the parents are living. When contingent remainders of this sort are created, they are called contingent remainders with a double aspect. In one event, that of there being a child, the fee vests in that child. In the converse event of there being no child, the fee vests in X. But until it is known whether there will be a child or not, both remainders are equally contingent. An estate in fee simple is, as you know, the largest estate which the law allows; and when once it is given, there is nothing left. There is not anything remaining, or, in other words, there can be no remainder after it. Here we have, therefore, two estates for life, namely, in the husband and wife successively, and two alternative contingent remainders in fee suspended on these life estates. But contingent remainders whilst they are contingent are not estates. And the law demands that there must be a reversion or remainder in fee simple, beyond the life estates, vested in some person or other. Now when the use is not disposed of, it results to the settlor and his

When the children take the fee.

Ultimate remainder contingent.

Contingent remainders with double aspect.

The reversion in fee not disposed of.

Results to
settlor.

heirs. The consequence is, that, in the case we have supposed, until a child is born, and so long as it is uncertain which alternative contingent remainder will take effect, the use of the reversion in fee results to the husband as settlor (*u*); and he becomes seised, not only of his life estate under the settlement, but also of the reversion in fee in the settled lands, expectant on the decease of his wife and himself. This is a very curious feudal doctrine. One would naturally have supposed that the lands having been given away, both in the event of there being a child and in the event of there being none, there was nothing left to belong to anybody. But the law holds otherwise; and whilst it allows you to create a contingent remainder, it still clings to its vested estates, and will not part with any vested estate until some other vested estate comes in its stead.

Example of
reversion in
fee subject to
contingent
remainders in
fee.

*Egerton v.
Massey.*

A good illustration of this doctrine is afforded by the case of *Egerton v. Massey* (*x*). In this case the alternative contingent remainders in fee were created by a will, and were destroyed by the merger of the life estate on which they depended in the ultimate vested reversion in fee of which I have just spoken. The destruction of contingent remainders in this manner is now prevented by the Act to amend the law of real property (*y*). But the doctrine that there still remains a vested reversion in fee, notwithstanding a contingent remainder in fee with a double aspect has been created, is still part of the law of real property. The case was this:—Elizabeth Glover, by her will, dated in 1786, devised a messuage and premises called The Asps to her niece Eunice Highfield for her life, and after her decease to her children as she should appoint by deed or will, and in default of appointment to her children living at her

(*u*) *Ante*, pp. 17, 19.

(*x*) 3 C. B., N. S. 358.

(*y*) Stat. 8 & 9 Vict. c. 106, s. 8;

ante, p. 186.

decease, and to the issue of such of them as should be then dead, the issue taking only their parent's share as tenants in common in fee. And for want of such issue she devised the premises to her nephew Peter Highfield in fee. And she gave and bequeathed all the residue and remainder of her estate and effects unto her niece Eunice Highfield, her heirs and assigns for ever. The testatrix died in 1789. Eunice Highfield never married, and consequently never had a child. On the death of the testatrix she entered into possession of The Asps. And on the 1st and 2nd of October, 1832, she executed indentures of lease and release, by which she conveyed The Asps unto and to the use of one Peter Jackson, his heirs and assigns, in trust for herself in fee. She died in December, 1855. Meantime Peter Highfield, to whom, as you may recollect, the property was devised for want of any child or issue of Eunice Highfield, having survived the testatrix, died in 1827, having made a will, whereby he devised the property to the plaintiffs in the action. The defendants claimed under Eunice Highfield and Peter Jackson, her trustee. The court gave judgment for the defendants. They held that, after the two alternative contingent remainders in fee had been created to the issue, if any, of Eunice Highfield on the one hand, and to Peter Highfield on the other hand, there still remained in the testatrix the reversion in fee of this very property; a reversion which, if undisposed of, would have descended to the heir at law of the testatrix. But they held that it was disposed of, and disposed of in favour of Eunice Highfield, by the gift to her in the will of all the residue of the estate of the testatrix, a construction which the testatrix herself probably little dreamt would be put upon her words. Eunice Highfield, therefore, had not only her life estate, but also the vested reversion in fee in the same property. And when she, being still a spinster, conveyed the property to Peter Jackson, the life estate merged in the

reversion in fee, and the contingent remainder to Peter Highfield was destroyed.

Contingent remainders not destroyed by immediate merger of life estate.

It may be asked why the contingent remainder to Peter Highfield was not destroyed the moment after the decease of the testatrix; for that moment the reversion in fee was given to her; so that she had both a life estate in The Asps, and also the immediate remainder in fee expectant on her own decease. The answer given is, that this would have destroyed the contingent remainders in their inception, and the law would not so totally defeat the intention of the testatrix (z). The law, in fact, seems to have treated contingent remainders as fair sport for lawyers. To destroy them at once would have been like shooting a fox. No; they were allowed proper law, after which they might fairly be destroyed. And even now, when forfeiture, surrender, or merger of the particular estate of freehold cannot destroy them, yet a chance of beholding their destruction still remains, if they are not ready to vest the moment the particular estate determines (a).

Where children take in fee, ultimate limitation is contingent.

In the case we have put, then, of a limitation to the use of the children of the marriage in fee, with an ultimate limitation, in default of children of the marriage, to the use of X. in fee, X. takes a contingent remainder in fee, which vests in him in fee, if there are no children; until which time of vesting the use results to the settlor and his heirs. If, however, a child should be born, an estate in fee immediately vests in that child. Should he die under age, and should there be no other child, then X. is still to take. But in this case X. takes by way of shifting use. The fee which had

(z) Fearn on Contingent Remainders, pp. 341 *et seq.*

(a) But see now stat. 40 & 41

Vict. c. 33; Lectures on the Seisin of the Freehold, Appendix (B), p. 205.

already vested in the child is shifted from him and vested in X.

In our second case of the children taking estates in tail with cross-remainders, the limitation in default of such issue to the use of X. in fee gives him a vested remainder, which is not and never was destructible by the same means as a contingent remainder; although it is liable to be defeated or barred by a disentailing deed executed by the tenant in tail.

Where children take estates tail, ultimate limitation is vested.

Powers of leasing and sale and exchange, of which more hereafter, and a power to appoint new trustees, with covenants for the title, bring our *Settlement* to an end.

In my next Lecture I hope to speak of those family settlements in which lands are settled on the *eldest son*.

LECTURE XV.

Family
settlements.

WE now come to the consideration of those family settlements, the object of which is to retain estates in the family, so far as the law will allow, by settling them upon the *eldest son*, with portions for the younger children, and annuities by way of jointure to the widows of the respective tenants for life.

Life estates
given to all
living per-
sons.

Estates tail
given to un-
born children.

A real settle-
ment.

This is effected in a manner which I partially explained in my first course of Lectures (*a*). The object being to continue the estate in the family for as long as the law will allow, life estates are given to all persons in being, through whom the devolution of the property is intended to pass; and, with regard to those who are unborn, estates in tail male or in tail general are given to them, which are contingent remainders until they are born, but which, after the birth of the respective owners, become vested estates in tail male or in tail. In these cases it is not usual to vest the whole fee simple in the trustees (*b*). The legal estate is given directly to the several tenants for life and in tail, by means of uses executed by the Statute of Uses (*c*). The settlement is also a real settlement and not a personal settlement (*d*). It is true that there is usually a power of sale, but the real character of the settlement is preserved by directing that the money to arise from any sale shall be laid out in the purchase of other lands, to be settled to the same uses, as we shall hereafter see more particularly. This is sufficient in equity to turn

(*a*) Lectures on the Seisin of the Freehold, pp. 170 *et seq.*

(*b*) See *ante*, p. 63.

(*c*) *Ante*, p. 1.

(*d*) See *ante*, p. 123.

the money which may arise from any sale into real estate, so that what is dealt with in such a settlement is real estate throughout.

The simplest form of such a settlement is a grant of the lands to one or more persons and their heirs, to the use of the intended husband, if it be a marriage settlement, after the marriage, for his life, with remainder to the use of his first and every other son, severally and successively, according to seniority, and of the several and respective *heirs male of the body and bodies* of such first and every other son, the elder of such sons and the heirs male of his body always to be preferred to the younger of such sons and the heirs male of his body. These limitations are shortly called "To the use of the first and other sons successively in tail male." In this case the father, being tenant for life, cannot do more than dispose of his own life interest in the property. And so long as all the children are under age, no disposition can be made of the fee simple. When the eldest son attains twenty-one, he may, if he pleases, without the consent of his father, turn his estate in tail male into a *base fee*, or an estate to endure so long as his own issue male endure, but no longer. And in order to effect this, he, in former days, levied a *fine* (*e*); and, now that fines are abolished, he makes a grant by deed, inrolled in the Chancery Division of the High Court within six calendar months. This is done under the provisions of the statute, which I explained at length in my first course of Lectures (*f*), namely, the Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance (*g*).

Simple form
of settle-
ment on
eldest son.

Base fee.

But with the consent of his father as *protector* of the settlement under that statute, the eldest son is enabled

Protector.

(*e*) Lectures on the Seisin of the Freehold, pp. 159, 172.

(*f*) *Ibid.* pp. 182, 183.

(*g*) Stat. 3 & 4 Will. IV. c. 74.

to bar his estate in tail male, and to create an absolute estate in fee simple in remainder, expectant on the decease of his father, by the execution of a deed of grant, to be inrolled within six calendar months under the provisions of the Act (*h*). It thus follows, that the father and son, when the son is of age, have again between them an absolute power of disposition over the whole estate. For the life estate of the father, and the estate in fee simple in remainder of the son, into which his estate tail has thus been turned, constitute together the whole fee simple. You will observe that it follows that, in a case of this sort, a life in being and twenty-one years after is the utmost limit for which the property is tied up. And it has been said by eminent authorities (*i*), and I believe it is the case, that this circumstance it was which induced the court ultimately to lay down the rule, that no property, whether real or personal, can now be settled in such a way, as in any event to exceed the period of a life or lives in being and twenty-one years after, including the period of gestation, if gestation should actually exist. But it has been decided that the term of twenty-one years need not necessarily be co-existent with the minority of some owner, but may be an absolute term. This is a subject which I spoke of in my second Lecture (*k*). However we have now, in the case supposed, the father and son together entitled to the property, with an absolute power to dispose thereof. The son has come of age, and is about to be married. This opportunity is then taken to make a re-settlement of the family estate. Of course the provisions of any re-settlement vary very much according to the circumstances of the family; but the general idea usually is, to keep the estate in the family as long as possible, and at the

Origin of rule
against per-
petuities.

Re-settlement
on eldest son
coming of
age.

(*h*) Lectures on the Seisin of the Freehold, pp. 181 *et seq.*

(*i*) See Principles of the Law of Real Property, p. 318, 12th ed.

(*k*) *Ante*, pp. 29 *et seq.*

same time to make necessary provision for the widow of the son, and for his younger children, assuming that the widow and younger children of the father are already provided for. A disentailing deed is then executed by the son, with the consent of his father as the protector. And it is usual to call into operation the Statute of Uses, by the father and the son, with his consent, uniting to grant the estate to A. B. (who may be anybody, and is frequently the family solicitor) and his heirs, to such uses as the father and son shall by deed jointly appoint; and, in default of such appointment and subject thereto, to the uses to which the property stood settled prior to the disentailing deed. This is a short deed, and, as enrolment is expensive, it is desirable that it should be so. It confers upon the father and son together, though not on one of them independently of the other, an absolute power to dispose of the whole property, by executing a deed of appointment of the use of the property; which use, when appointed, becomes, by virtue of the Statute of Uses, a legal estate, or any number of legal estates, according to the uses set forth in the appointment.

Disentailing deed.

Joint appointment of father and son.

The settlement is usually effected by means of the exercise of this joint power of appointment, by a deed, frequently dated the day following the disentailing deed. The father and son, by deed, referring to the power, and in exercise of it, appoint that the estates shall remain to the uses thereafter expressed. Now the first provision usually is a rent-charge to the son, during the joint lives of himself and his father, for his own maintenance and support and that of his wife and family, during the lifetime of the father. This rent-charge is created by way of use, under the 4th and 5th sections of the Statute of Uses, which I endeavoured to explain in my fifth Lecture (1). The father and son, in

Rent-charge to son during his father's life.

(1) *Ante*, pp. 66 et seq.

exercise of their power, jointly appoint that the estates shall remain to the uses already subsisting until the solemnization of the intended marriage; and from and immediately after the solemnization thereof, then to the use and intent that the son shall thenceforth, during the joint lives of himself and his father, receive out of the premises the yearly rent-charge agreed on, payable quarterly on the usual quarter-days. This rent-charge is secured by powers, also limited by way of use, of distress, in case the rent-charge should be unpaid, say for twenty-one days; and also of entry and receipt of the rents and profits, in case it should be at any time unpaid for a further period, say for forty days. There is also usually a further rent-charge of a smaller amount to the intended wife of the son, if she should be left a widow in the father's lifetime, during the joint lives of herself and the father, limited by way of use, like the son's rent-charge, and with the like powers, also limited by way of use, for securing the same. After the death of both father and son she has usually a rent-charge of a somewhat larger amount limited to her during the rest of her life, and secured in the same way. This is for her jointure (*m*), and is usually expressed to be in bar of her dower and free-bench out of her husband's freehold and copyhold or customary estates. And, in order the better to secure these rent-charges it is usual to limit the estate, subject to these rent-charges, to the use of trustees, their executors, administrators and assigns, for the term of, say 200 years, without impeachment of waste, upon trusts for better securing the rent-charges, which trusts are set out at length in a subsequent part of the settlement. Subject to these rent-charges and to the powers and term of years for securing the same, the property is then limited to *the use of the father and his assigns during his life*, generally without impeachment of waste, in

Rent-charges
to widow.

Jointure.

To trustees
for years for
securing
rent-charges.

Father for
life.

(*m*) *Ante*, pp. 76 *at seq.*

restoration of the life estate limited to him under the previous settlement, and of the powers to such life estate appendant or annexed. After the decease of the father a further term may be limited to other trustees, say for 99 years, upon trusts for securing a yearly sum by way of *pin money* (n) for the son's wife. Subject to this term, the property is then limited *to the use of the son and his assigns during his life*, generally without impeachment of waste; and after his decease, subject to the wife's jointure, and to the term and to the trusts thereof for securing the same, there is usually a limitation to other trustees, their executors, administrators and assigns, for a long term of years, say 1,000 years, to commence from the death of the survivor of the father and son, without impeachment of waste, upon trusts for securing *portions* for the younger children, which trusts are subsequently set out at length. Subject to these charges, and to the terms of years which are the machinery used for securing the same, the use of the property is then limited as follows:—To the use of the first and every other son of the son by his intended wife or any future wife, severally and successively and in remainder one after the other, according to their respective seniorities, and of the heirs male of their respective bodies; the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his body. This is usually by no means the end of the settlement. The next remainder to follow depends upon the state of the family. If, in addition to the eldest son, there are other sons living, the property is usually settled, by way of use, in the same manner, *to the use of the second son and his assigns during his life*, without impeachment of waste; with remainder to the use of his first and other sons, severally and successively in tail male as before. And in default of such issue, to the use of the

Pin money.

Son for life.

Term for portions.

First and other sons in tail male.

Second son.

(n) *Ante*, p. 129.

Third son. *third son* for life, with remainder to the use of his first and other sons successively in tail male in like manner, and so on. Or, perhaps, to daughters, in default of sons, either according to seniority or as tenants in common in tail, with cross-remainders between them, with an ultimate remainder to the use of the settlor, his heirs and assigns for ever. If the settlement extends beyond the sons of the settlor, there may be a direction to assume the *name and arms* of the settlor, with a *shifting clause* to cause a forfeiture of the estates of those who may refuse or neglect to attend to the direction. Or there may be a shifting clause on the accession of a title or of other estates. This is an outline of the settlement so far as the legal estates thereby limited are concerned.

Trusts of terms.

For securing rent-charges.

Then follow the declaration of the trusts of the several terms of years previously limited to different sets of trustees. The trusts of the first term of 200 years are for more effectually securing the rent-charges to the son and to his intended wife, should she survive him, during the life of the father and also after his decease. These trusts are very seldom called into action. The trusts are to permit the person or persons for the time being entitled in remainder immediately expectant on the determination of the term, to receive the rents and profits of the premises until default is made in payment of the rent-charge or some part thereof. As the rent-charge is usually paid as it falls due, this is the only trust that is usually exercised, and it leaves the beneficial enjoyment of the premises in the same state exactly as it was before. The trust, however, goes on to provide for the event of non-payment of the rent-charge for a longer period still than that on which the power of distress and the power of entry and receipt of rents and profits are limited to arise. The first of these is generally limited to arise at the end of twenty-one

days, the second at the end of forty days. And the trusts to enforce payment by means of the term of years are usually limited to commence in the event of default of payment by the space of sixty days. The trust then is by and out of the rents and profits of the premises comprised in the term, or by mortgage of the premises, and sometimes by sale of the premises for all or any part of the term, or by the sale of the timber or minerals, if any, thereon, to raise the rent-charge and all arrears and all costs and expenses, and to pay the same accordingly; and to pay the surplus, if any, of the money raised to the person or persons entitled in remainder immediately expectant on the determination of the term. Subject to these trusts, the trust is to permit the rents and profits of the premises, or so much thereof as shall not be required for the above purposes, to be received by the person or persons for the time being entitled to the premises in remainder immediately expectant on the determination of the term. The trusts of the term of ninety-nine years for securing the wife's pin money are of a similar character.

The trusts of the term, generally a long one, such as 1,000 years, for securing portions for the younger children, vary very much with the size of the estates and the position of the family. You will observe the position in which the term is placed. It follows the life estate of the son, the intended husband, and it precedes the estate in tail male limited to the eldest son who may be born. So that the eldest son, when born, takes the estate tail subject to the portions of his sisters and younger brothers; and no disentailing deed that he can execute can cut off these charges, because they are prior to the estate tail, and are not to take effect either after the determination or in defeazance of the estate tail of the eldest son. The sums secured for portions are usually so much, say 5,000*l.*, if only one

Trusts of
terms for por-
tions.

Portions
secured by
term are
prior to eldest
son's estate
tail.

Copyholds
settled.

Legal estate
in the trus-
tees.

Charges not
to be multi-
plied.

If copyholds are settled, they are usually surrendered to the use of the trustees, their heirs and assigns, according to the custom of the manor, upon trusts to correspond as nearly as may be to the uses declared of the freehold property, but so as not to increase or multiply the charges or the powers of charging of annual or gross sums upon the premises. The trustees are then admitted tenants on the court rolls of the manor, and acquire the legal customary seisin as joint tenants in fee. The rights of the beneficiaries are, therefore, equitable and not legal estates, as in the case of the freeholds. As the Statute of Uses does not apply to copyholds, it is impossible to settle the legal estate in copyholds, with powers of leasing, sale, &c., in the same manner as freeholds may be settled. It is found, therefore, to be best to vest the whole customary fee simple in the trustees, and to clothe the legal estate thus vested in them with trusts and powers to correspond with the uses and powers limited as to the freeholds. When there are charges of annual sums by way of pin money, jointure, or otherwise, or of gross sums for portions or otherwise, or powers to charge such annual or gross sums, it is usually said, by way of precaution, that the trusts by reference shall not increase the charges or powers of charging, that is, for example, that the widow shall not have one jointure out of the freeholds, and another jointure of the like amount out of the copyholds. The intention simply is, that the addition of the copyholds shall give an increased security for the charges, but not increase their amount. But in the absence of any express words negating an increase of the charges, a construction, the effect of which is to double the charges, will not be put upon ordinary words of reference, such duplication of charges not being ordinarily the intent of the parties (*p*).

(*p*) *Hindle v. Taylor*, 5 De Gex, M. & G. 577; *Baskett v. Lodge*, 23 Beav. 138.

If leaseholds for years or leaseholds for lives are settled, they also are usually assigned to trustees, upon trust, in the first place, to renew the leases, if renewable; and, subject thereto, upon such trusts as will correspond with the uses before declared of the freehold premises, and so as not to increase or multiply charges or powers of charging; with a provision that the leaseholds for years shall not vest absolutely in any tenant in tail who shall die under the age of twenty-one years without leaving issue inheritable under the entail. Leaseholds for years are not within the Statute of Uses. They are even incapable at law of being conveyed so as to vest them in a person for his life, and after his decease in another person absolutely. This may be done by will by way of executory bequest. But by deed it cannot. So that the only way by which land held for a long term of years can be vested beneficially in A. for his life with remainder to B. absolutely, is to assign it to a trustee or trustees in trust for A. for his life, and after his decease in trust for B. In the present case, therefore, the leaseholds for years are assigned to trustees. This vests the whole legal estate in the trustees absolutely as joint tenants. The trusts and powers correspond with the uses and powers as to the freeholds. But a difficulty arises from the fact that you cannot have an estate tail in property held on a lease for years. A term of years, by which is meant the property in lands held for a term of years, is not and cannot be at law the subject of any estate, whether for life, in tail, or in fee. It is accounted a mere chattel. And a gift of a chattel to any man in terms which, if it were freehold land, would vest in him an estate tail, simply gives him the absolute interest. If, therefore, leaseholds held for a term of years are given to the first or eldest son of A. and the heirs or heirs male of his body, or to trustees in trust for the first or eldest son of A. and the heirs or heirs male of his body,

Leaseholds
for years or
lives settled.

the eldest son will take absolutely in the former case at law, in the latter in equity. Should he die under age, his absolute interest will not cease, but will devolve on the administrator of his effects in trust for his next of kin. Now the father, if living, is the sole next of kin of any person who dies unmarried and without issue. In order, therefore, in such an event, to carry the leaseholds to the next eldest son and to prevent their going at once to the father, it is provided that they shall not vest absolutely in any tenant in tail who shall die under age without leaving issue inheritable under the entail. The trust, therefore, does not absolutely dispose of the leaseholds until some tenant in tail of the freeholds attains twenty-one, or dies under that age leaving issue inheritable under the entail. In the latter event the leaseholds still vest absolutely in the tenant in tail of the freeholds, but his issue take them as his next of kin; for, being an infant, he cannot make a will. He must needs die intestate; and his children take all his personal estate as his next of kin. His widow, if living, will take a third, no doubt; and if there should be more children than one, they will take the other two-thirds equally. But no trust can be framed which will bring the beneficial ownership of the freeholds and leaseholds more nearly together. Both leaseholds for years and leaseholds for lives are sometimes renewable on payment of a fine either fixed or arbitrary. In these cases the general rule is, that, as between the tenant for life and the remainderman, each contributes a share towards the fine and expenses of renewal, according to the time of his actual enjoyment of the renewed term.

Renewable
leaseholds.

Leaseholds
for lives.

Leaseholds for lives are differently situated from leaseholds for years. If you give leaseholds for lives to A. and the heirs or heirs male of his body, he does not take the whole absolutely, as in the case of lease-

holds for years. He takes what is called a *quasi estate* Quasi estate tail. *tail*, or *quasi estate* in tail male (*q*). This estate, if not barred by him, will descend on the heir or heir male of his body, as the case may be. But he may bar his quasi estate tail by a simple deed of assignment without any enrolment, though not by his will (*r*). And if there should be a prior tenant for life, his concurrence is necessary in order to enable the quasi tenant in tail to bar the remainders, if any, and reversion expectant on the determination of his estate tail. This doctrine seems to have been established in analogy to the old doctrine which required the writ of entry for suffering a common recovery, in order to bar an estate tail in freeholds, to be brought against the person seised of the freehold. It has nothing to do with the Act for the abolition of fines and recoveries. The tenant for life, whose concurrence is required, is, therefore, not necessarily the first tenant for life under the same settlement; but should be the tenant for life who has the legal seisin, whatever may be the origin of his life estate (*s*).

Sometimes plate, pictures, furniture, and other things of a personal nature are intended to go along with the family mansion as heir-looms. In this case they are Heir-looms. assigned to trustees upon the same trusts as the leaseholds for years; namely, upon such trusts as shall correspond with the uses of the freeholds, but so that they shall not vest absolutely in any tenant in tail, who may die under age, without leaving issue inheritable under the entail. In the absence of this last provision, the whole will vest absolutely in the first child born, whether he attains twenty-one or lives only for a few days (*t*).

(*q*) Lectures on the Seisin of the Freehold, pp. 166, 185.

(*r*) *Allen v. Allen*, 2 Dru. & War. 326.

W.S.

(*s*) *Edwards v. Champion*, 3 De Gex, M. & G. 202.

(*t*) *Foley v. Burnell*, 1 Bro. C. C. 274.

New trustees. When there is more than one set of trustees in a settlement, care should be taken not to give the power to appoint new trustees simply to the surviving or continuing trustee, without specifying of what trust he may be the surviving or continuing trustee. The power should be given to the surviving or continuing trustee of the trust premises, the trustee whereof may die, or decline or become incapable to act. The power to appoint new trustees is usually followed by covenants for the title and for further assurance by the father and son. And so ends our settlement.

Covenant for title.

What eldest son gives up and what he gains by re-settlement.

You will observe what it is, in a settlement of this kind, which the eldest son gives up, and what it is that he gains. He gives up the prospect of being tenant in tail in possession, or, in other words, absolute master of the whole property, in case he should survive his father. He gains a certain annual sum for the maintenance of himself and his widow during his father's life, and he sees the property secured to his eldest son after his own death, with portions for his younger children. The son should be fully informed of what he is about to do. In the event of the settlement being made on his marriage this is generally the case. And marriage is of itself a valuable consideration for the settlement. When the arrangement is between the father and son only, and the father receives any benefit, such as the payment of his debts by money raised by a charge on the fee simple of the estate, the son should be represented by a separate solicitor, so as to have the fullest information and guidance; or there may be a danger of the settlement being set aside, if the court should think that undue influence has been used on the father's part. "But if," in the words of Lord Romilly (*u*), "the father acquires no benefit not already possessed by him,

Where son should have separate solicitor.

Parental influence on re-settlement.

(*u*) In *Hoghton v. Hoghton*, 15 Beav. 305.

and if the settlement be a reasonable and proper one, the court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided also that there was no suppression of what is true or suggestion of what is false."

In my next Lecture I hope, in going through our settlement more in detail, to speak of the subject of *Waste* in connection with the first life estate in the settlement, which is usually limited "without impeachment of waste."

LECTURE XVI.

I MENTIONED in former Lectures that a tenant for life was frequently made tenant for life *without impeachment of waste* (a). I propose to devote the present Lecture to the subjects of waste and improvement.

Waste.	With regard to waste, a tenant for life and a tenant for years, when unaffected by any express restraint or liberty, appear to be in the same position. The Statute of Gloucester (b) provided that a man thenceforth should have a writ of waste in the Chancery against him who holds, by the curtesy of England or otherwise, for term of life, or for term of years, or a woman in dower. And he that shall be attainted of waste shall forfeit the thing which he has wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.
Statute of Gloucester.	
Writ of waste abolished.	The writ of waste was abolished by the 36th section of the present Statute of Limitation (c). It could only be brought by the owner of the immediate reversion of inheritance, and did not therefore lie when any other life estate intervened. But an action on the case in the nature of waste is the modern substitute for the old writ of waste; and this action may be brought by any person entitled to the premises in remainder or reversion for life or even for a term of years, if the injury be of a permanent nature (d). An injunction may also be obtained at any time to restrain the commission of waste which may be threatened.
Action on the case.	
Injunction.	

Timber. And first, with regard to timber and trees, oak, ash,

(a) *Ante*, pp. 74, 185, 216.

(c) Stat. 3 & 4 Will. IV. c. 27.

(b) Stat. 6 Edw. I. c. 5.

(d) 2 Wms. Saund. 252, n.

and elm are always timber; and by custom, in particular places, other trees, such as beech, when generally used for building (*e*), may be timber. But the question whether a tree is timber or not is not now very material; though in former days, when tithe was taken in kind, the question was often of importance. For although tithes were taken of saleable underwood, yet no tithe could be taken of any trees felled that were timber by law or custom, and of twenty years growth or upwards. It appears to be waste to cut down any tree, whether timber or not, which, when cut down, will not grow again. Thus, though a fir tree is not timber, it has been said to be waste to cut it down to the ground, because it will not grow again (*f*). But it is not waste to cut down a willow tree, leaving the stool or but, because it will shoot out afresh (*g*). It is equally waste to cut down a timber or other tree, whether it be cut to improve the growth of other trees, or because it is so ripe that it would take injury by standing. And even in the case of a willow or other tree which, when cut, will grow up again, it is waste to cut it if it serve for shelter for the dwelling-house, or as a support to the bank of a stream against the water. It is, of course, waste to cut down a fruit tree in a garden. It is said in the books not to be waste to cut down fruit trees which do not grow in a garden or orchard, but grow scatteringly in divers places of the land (*h*). I think, however, that this must be taken of fruit trees evidently growing in wrong places, and which interfere with the proper cultivation of the land. For I apprehend that it would be clearly waste to cut down a fruit tree in full bearing in a proper situation, though not in a

No tithe of
timber.

Fir trees.

Willow trees.

Fruit trees.

(*e*) Co. Litt. 53 a; 2 Bl. Com. 281.

(*f*) Per Rolfe, B., 14 M. & W. 593.

(*g*) *Phillipps v. Smith*, 14 M. & W. 589.

(*h*) Kerr on Injunctions, 244, first ed., citing Bro. Abr. tit. Waste, pl. 143.

Hedges.	garden or orchard. It is also waste to stub up a hedge.
Underwood.	But it is not waste to cut underwood, in due course, according to the custom of the country, including young trees, for thinning, if such be the custom (<i>i</i>); nor to lop pollards in due course. Nor is it waste to cut down a dead tree (<i>k</i>). And even timber trees may be cut if required for, and used towards, the repair of the house or the fences. But it is not lawful to cut and sell any timber, even with a view of buying with the proceeds of the sale other and more appropriate timber for the purpose of repairs (<i>l</i>). So boughs may be cut for fuel; and timber may be cut down for making or repairing instruments of husbandry. The right to take wood for the above purposes is called in French <i>estovers</i> , and in Saxon <i>botes</i> ; house-bote, fire-bote, plough-bote, cart-bote, and hedge-bote being the right to take wood for repairing the house, for firewood, for instruments of tillage, and for repairs of fences. When timber is blown down or wrongfully cut, the property therein vests at once in the owner of the first estate of inheritance in the land, provided that the tenant in possession be not without impeachment of waste. But in modern times the Court of Chancery has exercised a beneficial jurisdiction in allowing timber on an estate which would take injury by standing to be cut by a tenant for life, though not without impeachment of waste, the proceeds of the sale of such timber being invested upon trusts to correspond with the uses to which the lands are settled. So that the tenant for life thus gets the income of the money which has arisen from the sale (<i>m</i>).
Dead tree.	
Repairs.	
Estovers.	
Botes.	
Timber blown down.	
Timber cut and sold by order of court.	

The Settled Estates Act, 1877 (*n*), expressly em-

(*i*) *Earl Cowley v. Wellesley*, 35 Beav. 635.

(*k*) Co. Litt. 53 a, b.

(*l*) Co. Litt. 53 b.

(*m*) See Principles of the Law of Real Property, p. 25, and cases there cited.

(*n*) Stat. 40 & 41 Vict. c. 18, s. 16.

powers the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to authorize a sale of any timber (not being ornamental timber) growing on any settled estates. The purchase-money arising from a sale under this Act is to be applied (o), so far as relates to estates in England, in the purchase or redemption of the land tax; and so far as relates to estates in Ireland, in the purchase or redemption of rent-charge in lieu of tithes, crown rent, or quit rent; or in the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or in the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or in the payment to any person becoming absolutely entitled.

With regard to hedges it may be as well to mention, that where two fields are separated by a hedge and ditch, the hedge and ditch both belong to the owner of the field on whose side the hedge is. His predecessor in title is supposed to have dug the ditch at the extremity of his own soil, and in so doing to have thrown up the earth dug out on to his own land, rather than on to the land of his neighbour; thus making a bank on his own side, on which the hedge was afterwards planted (p). Hedge and ditch.

When a person is tenant for life *without impeachment of waste*, he has a right to cut timber and other trees in a husbandlike manner, for his own benefit. The timber when cut or blown down will belong to him, and not Without impeachment of waste.

(o) Sect. 34.

(p) *Vowles v. Miller*, 3 Taunt. 137, 138.

Trees planted
or left stand-
ing for orna-
ment.

Equitable
waste.

to the owner of the first estate of inheritance in the land. But there are some trees which he has no right to cut down. All saplings or unripe wood, and also all trees, whether timber or not, such as fir trees, chestnuts, sycamores or limes, which have been planted or left standing for ornament of the house, gardens, park, or pleasure-grounds, or for shelter to the house, must be preserved, whether they have begun to decay or not. The cutting of such trees is called *equitable waste*; for though such cutting was not waste at law, it was waste in equity. The Supreme Court of Judicature Act, 1873 (*g*), provides (*r*), that an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. Waste of this description is therefore now contrary to law, as before this Act it was contrary to equity.

Timber is
part of the
inheritance.

Although a tenant for life without impeachment of waste may cut the timber for his own benefit, yet the timber, whilst uncut, forms part of the inheritance. And if the property should be sold in pursuance of a power of sale contained in the settlement, and the timber taken at a valuation, as it often is, the price of the timber must not be paid to the tenant for life, though he be without impeachment of waste; but it must, together with the purchase-money for the land, be paid to the trustees of the settlement, to be invested by them in the purchase of other lands to be settled to the same uses. A mistake in this respect once caused the loss of a valuable estate, that of White Knights, near Reading. The lands were devised by the will of Sir Henry Englefield to trustees in trust for his eldest son (afterwards

Will of
Sir Henry
Englefield.

(*g*) Stat. 36 & 37 Vict. c. 66.

(*r*) Sect. 25, subsect. 3.

Sir H. C. Englefield) for life, without impeachment of waste, with remainder to trustees during his life to preserve contingent remainders; with remainder to the first and other sons of his eldest son in tail male, with divers remainders over. And the will contained the usual power for the trustees, at the request of the person for the time being in possession of or entitled to the rents and profits of the premises, to sell or exchange the premises, and for that purpose to revoke the subsisting uses and trusts, and to appoint such other uses as might be necessary for any such sales or exchanges. The trustees of the will, in intended exercise of this power of sale, sold the estate for 13,400*l.*, *exclusive of the timber thereon*, and Sir H. C. Englefield, the tenant for life in possession, sold the timber, wood, and underwood to the purchaser for 2,448*l.* Sir H. C. Englefield then died without issue, and the next remainderman claimed the estate, on the ground that the power of sale had not been properly executed, and that the sale was consequently void, the uses created by the will remaining unrevoked. And so it was held by the Court of Common Pleas, and afterwards by a court of error. You will find the case reported as *Cholmeley v. Paxton* in the Common Pleas (*s*), and as *Cockerell v. Cholmeley* in the Court of Error (*t*). Lord Tenterden, in delivering the judgment of the Court of Error, said: "I do not treat this as a case of fraud, but as a case of failure of compliance with that condition, on which alone the uses mentioned in the testator's will could be revoked, and the estate be applied to other uses." The revocation could only be made to the end that a conveyance might be made of the land. "It is said," his lordship continued, "that this might be lawfully done (that is, that the tenant for life might lawfully sell the timber), because the tenant for life without impeachment of

Cholmeley v. Paxton.

Cockerell v. Cholmeley.

Judgment of Lord Tenterden.

(s) 3 Bingham, 207.

(t) 10 Barn. & Cress. 564.

waste might, at law, have cut down all the timber trees and underwood. It is not material for us to consider whether he could by law have cut down trees to the extent of those which he has sold, because my opinion is, that, according to the terms of the testator's will, if the tenant for life thought fit to consent that the estate should be sold, he was bound to suffer it to be sold in the state in which it was at that time, and not to sever from it the timber or other trees, but let the whole go together."

Attempt to
cure defect by
investing the
price of the
timber.

The sale was made in 1783. In the year 1806 Sir H. C. Englefield was advised that it was doubtful whether he ought to have received the sum of 2,448*l.*, the purchase-money for the timber; and in order to remedy this defect he invested in the name of Lord Cadogan, the surviving trustee of his father's will, a sum of consols equal to the amount which 2,448*l.* sterling would have purchased at the date of the sale. After his death, and after the adverse decision had been given by the courts of law, the purchaser, or rather those who claimed under him, filed a bill in the Court of Chancery to have the defect in the execution of the power supplied by that court, and to restrain proceedings under the judgment at law. But here, again, they were unfortunate; for their bill was dismissed; and the dismissal was affirmed by the House of Lords. The proceedings are reported under the names of *Cockerell v. Cholmeley*, in the Court of Chancery (*u*) and in the House of Lords (*x*). The court held that, although it might supply a defect in the execution of a power which consisted in the want of some circumstance required in the manner of execution, as the want of a seal or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will; yet here it was

Cockerell v.
Cholmeley.

(*u*) 3 Russ. 565; 1 Russ. & My. 418. (*x*) 1 Clark & Fin. 61.

at law decided that there was no power in the trustees to sell the land without the growing timber; and there was no authority applying to the case.

This was undoubtedly a case of great hardship; and in order to prevent the recurrence of such a hardship, the late Lord St. Leonards procured the following enactment to be made. The Act is intituled "An Act to amend the Law of Property and to relieve Trustees" (*y*), and it enacts (*z*) that where, under a power of sale, a bonâ fide sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal moneys and interest under the direction of the court upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed; and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

Enactment
in conse-
quence.

It is waste to alter the character of the cultivation of the lands, as to turn arable land into pasture or pasture

Turning
arable into
pasture.

(*y*) Stat. 22 & 23 Vict. c. 35.

(*z*) Sect. 13.

into arable, or to grub up a wood or hedge (a). And even a tenant for life without impeachment of waste cannot always do these things with impunity. For any act which amounts to malicious destruction or wanton spoliation of the property comes within the principle of equitable waste, and will be restrained accordingly (b).

Equitable
waste.

Houses.

With regard to houses and buildings it is *waste* to pull them down. It is also *permissive waste* to allow them to become ruinous for want of proper repair. But a tenant for life without impeachment of waste may permit houses or buildings to go to ruin with impunity. But he must not wantonly or maliciously pull them down. Still less may he pull down or injure the family mansion; for this would be *equitable waste*. A leading case on this subject is that of *Vane v. Lord Barnard* (c), decided in 1716. The defendant, Lord Barnard, on the marriage of the plaintiff, his eldest son, settled Raby Castle on himself for life without impeachment of waste, with remainder to his son the plaintiff for life, with remainder to his first and other sons in tail male. Lord Barnard, having, as the report states, taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors and boards, &c., to the value of 3,000*l*. But the court, upon the filing of the bill, granted an injunction to stay committing of waste in pulling down the castle; and upon the hearing of the cause decreed not only the injunction to continue, but that the castle should be repaired and put into the same condition it was in, in August, 1714. And for that purpose a commission was ordered to issue to ascertain what ought to be repaired, and a master to see it done, at the expense and charge of the defendant, the Lord Barnard. And the court decreed the plaintiff his costs.

Equitable
waste.

*Vane v. Lord
Barnard.*

(a) Co. Litt. 53 b.

(c) 2 Vernon, 738.

(b) *Aston v. Aston*, 1 Ves. sen. 264.

With regard to mere permissive waste, courts of equity have never interfered; for what reason it is not easy to see. But a tenant, whether for life or years, whose estate is not given to him without impeachment of waste, is now held, by the better opinion, to be liable at law for permissive waste (*d*). And the Judicature Acts do not seem to me to affect his liability.

Permissive waste.

With regard to mines, quarries, brick-earth, and turf in bogs, the rule is this:—It is not waste to continue the working and getting of mines, quarries, brick-earth, and turf in bogs which have been already opened and worked and usually got. But it is waste to open a new mine or quarry, to dig for brick-earth where it has not been dug before, or to cut turf in bogs where it has not been cut before. A tenant for life without impeachment of waste may, however, do any of these things. It is obviously, therefore, very much to the advantage of a tenant for life to be tenant for life *without impeachment of waste*.

Mines, quarries, &c.

A tenant in tail in possession may commit any kind of waste, whether legal or equitable. But a tenant in tail after possibility of issue extinct stands on a different footing, so far as equitable waste is concerned. I mentioned in a former Lecture (*e*) that this kind of tenancy arises under such a gift as to a man and his wife and the heirs of their bodies. Here, if one of them dies without issue, the survivor is tenant in tail after possibility of issue extinct. It has been decided (*f*) that the survivor, in such a case, is unimpeachable of waste, and that he or she, having cut timber, is entitled to the timber so cut as his or her own property. But such

Tenant in tail.

After possibility of issue extinct.

May commit legal waste,

(*d*) *Yellowly v. Gower*, 11 Ex. the Freehold, pp. 159, 160, 162.
274, 293, 294.

(*f*) *Williams v. Williams*, 12 East, 209.

(*e*) Lectures on the Seisin of

but not equitable waste. survivor has no right to commit equitable waste (*g*). In this respect he or she is treated as a mere tenant for life.

Tenant in fee.

Shifting use or executory devise.

Turner v. Wright.

A tenant in fee simple may commit any waste, whether legal or equitable. But if his estate in fee be subject to be divested, on any given event, in favour of some other person, by means of a shifting use in a deed, or an executory devise in a will, though he may commit legal waste, he will be restrained from committing equitable waste. The leading case on this subject is that of *Turner v. Wright* (*h*). The testator, E. Wright, by his will, dated in 1853, devised his mansion-house and estates in the county of Lincoln to the use of his brother, the Reverend William Wright, in fee; but in case he should die without leaving issue living at the time of his decease, then the testator devised his said mansion-house and estates to the use of his sister and her assigns during her life without impeachment of waste, and from and after her decease, to the use of Samuel Wright Turner, Esq., in fee. The testator died in 1857, when the Reverend William Wright, being then of advanced age, entered into possession of the devised premises; and sometime afterwards cut some, and marked for cutting other, of the timber upon the estates, and advertised a sale of it. Thereupon Samuel Wright Turner filed his bill against the Reverend William Wright, praying that he might be restrained by injunction from cutting down any timber, or, at any rate, any ornamental or immature timber, and for an account of timber already cut. The case came first before Vice-Chancellor Sir W. P. Wood, now Lord Hatherley, and is reported in Johnson's Reports (*i*). The Vice-Chancellor declared that the

(*g*) Per Campbell, C., 2 De Gex, Fisher & Jones, 247.

(*h*) 2 De Gex, Fisher & Jones, 234.

(*i*) Page 740.

defendant William Wright was entitled to fell all such timber on the devised estates as was mature or fit to be cut, except such as was planted or left standing by way of ornament or shelter, with reference to the occupation of the mansion-house; but that he was not entitled to cut any unripe timber, or any timber planted or left standing for shelter and ornament as aforesaid. And this decree was affirmed on appeal by Lord Campbell, then Lord Chancellor (*k*). Here you see that William Wright was seised in fee, subject to an executory devise over in the event of his death without leaving issue living at the time of his decease. And it was held that he was entitled to commit legal waste, but not entitled to commit equitable waste.

With regard to improvements, the general rule is that not only all repairs which the tenant for life may think needful, but also all improvements which he may think proper to make, must be paid for by himself, and cannot be charged by him on the inheritance of the settled lands. Improvements.

In like manner the duty devolves upon him of maintaining the title against adverse claimants; and if an action of ejectment should be brought against him for the recovery of the fee simple in possession of the settled lands, he cannot charge the inheritance with any share of the expenses of defending the action. In this respect, however, a beneficial change in the law has recently been made. The Settled Estates Act, 1877 (*l*), now provides (*m*) that it shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in the Act contained, Defence of title.

New enactment.

Proceedings for protection of the estate may be charged by the court on the inheritance.

(*k*) 2 De Gex, Fisher & Jones,
234.

(*l*) Stat. 40 & 41 Vict. c. 18.
(*m*) Sect. 17.

to sanction any action, defence, petition to Parliament, parliamentary opposition or other proceedings appearing to the court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of, or charge upon, all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits or income.

Permanent
improve-
ments.

Petition to
Chancery.

Improvement
of Land Act,
1864.

So, of late years, very beneficial alterations have been made in the law, for the purpose of encouraging improvements of a permanent nature, by enabling a tenant for life, or other owner having only a limited estate, to effect improvements and to charge the amount of the cost, with interest, on the settled lands, to be repaid by equal yearly instalments during a period of so many years. Thus the Act of 8 & 9 Vict. c. 56, enables a tenant for life to apply by petition to the Chancery Division of the High Court for leave to make the improvements therein mentioned, and to charge the same on the inheritance, to be repaid by equal annual instalments, as therein mentioned. But the principal Act for this purpose now in force is the Improvement of Land Act, 1864 (*n*). The improvements under this Act are carried on under the superintendence of the Inclosure Commissioners for England and Wales. The improvement of land within the meaning of the Act extends to all or any of the following matters:—

Sic. “1. The drainage of land, and the *straitening*, widening, deepening, or otherwise improving the drains,

(*n*) Stat. 27 & 28 Vict. c. 114.

streams and watercourses of any land. 2. The irrigation and warping of land. 3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams in a permanent manner. 4. The inclosing of lands, and the *straitening* of fences and *Sic.* re-division of fields. 5. The reclamation of land, including all operations necessary thereto. 6. The making of permanent farm roads and permanent tramways and railways and navigable canals for all purposes connected with the improvement of the estate. 7. The clearing of land. 8. The erection of labourers' cottages, farmhouses, and other buildings required for farm purposes, and the improvement of, and addition to, labourers' cottages, farmhouses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature. 9. Planting for shelter. 10. The constructing or erecting of any engine-houses, waterwheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, floodgates or hatches, which will increase the value of any lands for agricultural purposes. 11. The construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes; provided that the commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof. 12. The execution of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof."

The commissioners are to sanction such improvements, or such part thereof as they shall think expedient, if they

Sanction by
Commis-
sioners.

W.S.

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shall find that the proposed improvements, or any part thereof, with or without any alterations by them required or sanctioned, would effect a permanent increase of the yearly value of the lands proposed to be improved, or of any part thereof, exceeding the yearly amount proposed to be charged thereon (*o*). This is a very important provision; but as the expected increase of yearly value must be matter of opinion, it is not, and cannot be, a certain guarantee that the money spent will not be thrown away. The rate of interest is to be fixed with regard to the market value of money at the time; but it is never to exceed five per cent. per annum, and the principal and interest are to be repaid by yearly instalments not exceeding twenty-five (*p*).

Rate of interest.

Instalments.

Residences on settled estates.

Two further Acts have been passed for the purpose of enabling owners of land, having limited estates, to charge the land with the expense of erecting a suitable mansion-house on the estate. These are the Limited Owners' Residences Act, 1870 (*q*), partly repealed and amended by the Limited Owners' Residences Act, 1870, Amendment Act, 1871 (*r*). These Acts are construed as one with the Improvement of Land Act, 1864. The Amendment Act provides as follows (*s*):—"The erection of a mansion-house, and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto, and held and enjoyed therewith, and the completion of any mansion-house and such appurtenances as aforesaid, and the improvement of, and addition to, any mansion-house and such appurtenances as aforesaid already erected, and the improvement of, and addition to, any house which is capable of being converted into a mansion-house suitable to the estate on which the same stands, so as such improvement and addition be of a

(*o*) Stat. 27 & 28 Vict. c. 114,
s. 25.

(*p*) Sect. 26.

(*q*) Stat. 33 & 34 Vict. c. 56.

(*r*) Stat. 34 & 35 Vict. c. 84.

(*s*) Sect. 3.

The former of these Acts provides (t) that the sum charged on any estate under settlement, in respect of mansion and other buildings before mentioned, shall not exceed two years' rental of the estate, after deducting all public charges and interest of debts, and other incumbrances and annuities affecting or which may affect the inheritance, after the death of the limited owner. In calculating whether the improvement would effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, the Commissioners are to take into account the effect on such value of any sum expended by the landowner in erecting or adding to such mansion-house and appurtenances beyond the sum proposed to be charged (u). If the Commissioners find that the erection or improvement of, or addition to, any such mansion-house and appurtenances are suitable to the estate, but would not, in their estimation, effect an increase of the yearly value of the lands exceeding the yearly amount proposed to be charged, it is in their discretion to certify such improvement (x). A charge of land under this Act has no priority over any mortgage or other incumbrance affecting the land charged at the time such

Limited Owners' Residences Act, 1870.

R 2

Priority of
charges.

charge is made (*y*). Charges for other improvements have priority over all existing mortgages and incumbrances (*z*); but due provision is made (*a*) for giving to all mortgagees and incumbrancers notice of what is proposed to be done, and an opportunity, if they think fit, of opposing the same.

Money to be
laid out on
lands to be
settled to
same uses.

In addition to the improvements which may be thus effected, it sometimes happens that a tenant for life may get improvements effected by means of money which is not absolutely his own, but to the income of which he may be entitled for his life. A part of the estate may be taken for a railway or other public work, or a part may have been sold under a power of sale contained in the settlement, or under the Settled Estates Act, 1877 (*b*). In all these cases, though the provisions may slightly vary, yet substantially the money arising from the sale is to be laid out in the purchase of other lands to be settled to the same uses. Under exceptional circumstances such money has sometimes, though rarely, been allowed to be expended in repairs. But the placing of a new building on the land is looked upon in the same light as the acquisition of new land; and the court will accordingly permit such money to be expended either in the rebuilding of such buildings as are so ruinous as to be beyond repair, or in the erection of new and suitable buildings for the improvement of the estate (*c*).

(*y*) Sect. 9.

(*b*) Stat. 40 & 41 Vict. c. 18.

(*z*) Stat. 27 & 28 Vict. c. 114,
s. 59.

(*c*) *Drake v. Trefusis*, L. R.
10 Ch. 364.

(*a*) Sects. 17, 18.

LECTURE XVII.

I PROPOSE to devote the present Lecture to the consideration of terms of years. A term of years in law denotes not merely a certain time or number of years, but that interest in land which a man possesses to whom land has been given for a certain term or number of years.

A term of years.

As you have already seen, terms of years play an important part in family settlements of real estate, being the means by which money charges of annual and principal sums, such as jointures and portions, are secured on the settled lands. The great difference between these terms and the estates enjoyed successively by the beneficial owners of the settled lands consists in this,—that a term of years is not a freehold, whereas the estates of the beneficiaries are freehold estates. A term of years must have a certain beginning, and also a certain ending or term, which is the extreme boundary of its existence, although it may never reach that boundary. Thus, an estate for ninety-nine years from a certain time is a term for years absolute; and an estate for ninety-nine years, if A. B. shall so long live, is still a term of years, though determinable by the decease of A. B. But an estate for the life of A. B. is a freehold. The length of the term does not affect its nature. Why ninety-nine years should be so frequently used instead of 100, and 999 instead of 1000, I have never been able to ascertain. A term of three, five, or seven years has the same legal qualities as a term of 10,000 years; and a term of 10,000 years, if a man shall so long live, will not confer a freehold, although

Terms of years used in family settlements.

A term is not a freehold.

A term has a certain beginning and end.

for all practical purposes such an estate is evidently equivalent to an estate for his life.

Chattel interests.

Chattels real.

No estates in terms of years.

Executory bequest.

Tenant for years is not seised.

Freeholder in remainder or reversion on

Terms of years are said to be chattel interests. They are subject to the same laws as goods and chattels; though as they have something to do with real estate, or, as it is said, savour of the realty, they are called *chattels real*. They are unlike real estate in this, that you cannot have an estate in them for life, or in tail, or in fee. This doctrine was at one time so strictly carried out that a gift by will of a term of years to A. for his life, and after his decease to B., was held to vest the whole term in A. absolutely (a). It was said that that which the testator cannot do, by any advice of counsel, in his life, the testator, who is intended to be *inops consilii*, shall not do by his will. And true it is that even now a grant by deed of lands held for a term of years to A. for his life, and after his decease to B., will vest the whole term in A. But in order to carry out the intention of the testator, for which the law always expresses a great regard, it was held that though indeed the whole term vested in A., and so B. took nothing, yet when A. died it might shift to B., not as a remainder expectant on A.'s life estate, for that was impossible, but by way of executory bequest, the whole term going over on A.'s death; just as in a marriage settlement, under the Statute of Uses, the fee simple goes over the moment the marriage is solemnized.

The tenant of lands for a term of years, not being a freeholder, is not seised. The feudal seisin is in the freeholder, whether for life, or in tail, or in fee. And as I mentioned in a former Lecture (b), the possession of a tenant of lands for a term of years confers on the freeholder in remainder or reversion an *actual seisin* of

(a) See 8 Rep. 95 a.

(b) Lectures on the Seisin of the Freehold, pp. 5, 54.

the lands, and not merely a seisin in law. If I grant my freehold lands to A. B. for 1,000 years without impeachment of waste, whether legal or equitable, practically I have nothing left, nothing certainly for which any body would give me sixpence. Yet the law assures me that I am still actually seised; and the title of those who claim under me is traced precisely as if I were so. They are seised of lands which are not their own. The term no more interferes with the legal seisin than a sheet of linen spread upon the grass of a field to dry interferes with the possession of the field.

term of years
is actually
seised.

A person to whom lands have been granted for a term of years is not tenant for the term until he has entered. Until entry he has what is called an *interesse termini*, or a mere right to have an estate for a term of years in the lands on his entry. But if the term of years is limited to him by way of use under the Statute of Uses, he is at once put into possession by force of that statute, whether he has actually entered or not (c).

*Interesse ter-
mini.*

A term of years and an estate of freehold differed in ancient times, not only as respects the feudal seisin, but also with respect to the remedies for the recovery of the lands in case of dispossession. The freeholder had his writs of entry or his writs of right, by means of which his seisin might be recovered (d). The leaseholder for years had in ancient times, it is said, no remedy for the recovery of his lands; but he might, if dispossessed, bring an action for damages against his landlord under the warranty implied by the word *demise*, the technical term by which a lease for years is granted. In process of time, however, the writ of *ejectione firmæ* was allowed to the leaseholder for years; and by means of this writ he was enabled to recover possession of the lands from

Remedies for
recovery of
lands.

Writ of
ejectione firmæ.

(c) Lectures on the Seisin of
the Freehold, p. 141.

(d) *Ibid.* pp. 155, 156.

Action of
ejectment.

which he had been evicted. This writ was so convenient, and was so superior in simplicity to the writs of entry and of right which belonged to freeholders, that in process of time freeholders themselves were glad to avail themselves of it, for the purpose of deciding disputed questions as to the right to the possession of lands. The person who claimed possession of the lands in dispute made a lease of them to some friend of his for a term of years. The lessee then made an actual entry into the lands, claiming to hold them by virtue of the lease so granted. The person in possession of course turned him out; whereupon he sued out his writ of *ejectione firmæ*, or, in other words, brought an *action of ejectment*, for the recovery of the possession of the lands for the remainder of the term of years which had been granted to him. If he succeeded, it was on the ground that he had a valid lease, and if so his lessor must have had a valid title. He gave up to his friend the lessor the possession which he had recovered; and the lessor was thus spared the expense and trouble of a real action. If the lessee failed in his ejectment, it was a proof that his lessor had no right to grant him his lease; in this case, therefore, the lessor of the plaintiff took nothing by the action. These proceedings were found so convenient that they were encouraged by the judges, who allowed fictitious leases to be supposed to have been made to fictitious persons for the purpose of trying the right to the possession of lands. The lessor of the plaintiff, who was the real claimant, was supposed to have granted a lease of the lands which he claimed to a fictitious lessee, whose name was given him by the attorney of the claimant. John Doe was his usual appellation. Sometimes, by way of variety, he was styled Richard Roe; and the more imaginative attorneys would give him such names as John Goodtitle, Thomas Thrustout, Richard Goodright, and the like. The defendant, against whom the action was brought,

was allowed to defend it only on the terms of admitting the facts that the claimant had actually granted a lease of the lands to John Doe, or whatever else he was called, that John Doe had entered on the lands by virtue of such lease, and that he the defendant had turned him out. This was called confessing lease, entry and ouster, all of which the courts obliged the defendant to do, for the purpose of facilitating the trial of the question as to who was entitled to the possession of the lands claimed. This action of ejectment thus conducted was long in common use, and in process of time it almost entirely superseded the multitude of writs which the law had provided for the convenience of freeholders. And in the year 1833 the Act for the limitation of actions and suits (*e*) abolished all writs of entry and of action, leaving nothing but this action of ejectment, by which a freeholder, if disseised, might recover possession. In the table of cases, which is to be found at the beginning of every real property law book, you will always find a number of cases, Doe d. So-and-So *v.* So-and-So, or Doe on the demise of So-and-So *versus* So-and-So. All these are ejectment cases, determining the right to the possession of land under different circumstances. The Common Law Procedure Act, 1852 (*f*), simplified the proceedings in ejectment by abolishing the fictitious plaintiff, the fictitious lease to him by the lessor of the plaintiff, his fictitious entry, and also his fictitious ouster, and enabling any person claiming possession of lands to bring an action of ejectment against the person in possession of them. But the history of the action curiously illustrates the difference between a term of years and a freehold, and shows how very gradually feudal institutions have given way to the necessities of modern times.

Confessing
lease, entry
and ouster.

(*e*) Stat. 3 & 4 Will. IV. c. 27,
s. 36.

(*f*) Stat. 15 & 16 Vict. c. 76,
sects. 168 *et seq.*

Lease and re-
lease.

I mentioned in a former Lecture (*g*) the constant use long made of a term of years in facilitating the conveyance of land, without the necessity of actual delivery of the seisin. For about two centuries a lease and release was the ordinary mode of conveying freeholds. A bargain and sale of lands for a year put the bargainee in actual possession without entry, by virtue of the Statute of Uses, for the term of one year, and enabled him at any time during that term to receive a release of the inheritance; livery of seisin being unnecessary in consequence of his being already in actual possession under the statute. This could not have been done if a term of years had been a freehold. The Statute of Enrolments (*h*) required that every bargain and sale of an estate of freehold should be enrolled within six months. A bargain and sale for a year did not confer a freehold, and therefore did not require enrolment. The chattel nature of a term of years was thus made use of to obtain a conveyance of the freehold without the publicity of livery of seisin or enrolment.

Trusts of
terms for
raising
money.

The fact that the existence of a term of years does not interfere with the feudal seisin, whilst it points to such a term as a convenient instrument for securing pecuniary charges on land, would not have brought terms so much into use, had it not been for the doctrines of Courts of Equity with respect to the trusts of such terms. The trusts of these terms are, as we have seen (*i*), to raise the money required by receipt, technically called *perception*, of the rents and profits, or by mortgage, or perhaps by absolute sale, of the premises for the whole or any part of the term limited. But, subject to the raising of the money required, the trust is to permit the person or persons for the time being entitled

(*g*) Lectures on the Seisin of
the Freehold, p. 146.

(*h*) Stat. 27 Hen. VIII. c. 16.

(*i*) *Ante*, p. 219.

to the reversion or remainder immediately expectant on the determination of the term to receive the rents and profits of the premises, or so much thereof as may not be required for the purposes of the previous trust for raising the money intended to be secured. Now a term of years is in law a chattel interest, and does not, on the decease of its owner, descend to his heir, but devolves on his executor or administrator. So, as equity follows the law, the trust or equitable interest in a term of years, the legal estate in which is vested in a trustee, devolves in like manner on the executor or administrator, and does not descend to the heir of the beneficiary. But this rule is subject to one important exception in the case where a man has, as he evidently may have, an estate of freehold and inheritance in the reversion of land which is subject to a term of years in possession, and also a corresponding estate in equity, so far as the two estates can correspond, in the trusts of the term of years, under a trust to permit the person for the time being entitled in reversion to receive the surplus rents and profits. In such a case as this, equity does not consider the man as entitled to two distinct estates, one a chattel interest of an equitable kind in the term of years, and the other a remote reversion of a freehold nature expectant on the determination of the term. But as a freehold, however remote from actual possession, is in legal estimation of much more consequence than a chattel interest, however long, the man is viewed in equity as a freeholder in actual and immediate possession; and the term of years, which is held in trust to permit him to receive the surplus rents and profits of the premises, is said (subject to the charge intended to be secured) to be held *in trust to attend the inheritance*. The freehold nature of his legal estate in reversion attracts, and governs, as it were, the trust of the term of years held for his benefit. So that, whilst in law he is seised of an estate of freehold in remainder or

Trust of a term devolves on executors.

Exception where beneficial owner is also freeholder.

Trust to attend the inheritance.

reversion expectant on the distant determination of the term, in equity he is deemed to be seised of a commensurate estate of freehold in immediate possession, subject only to the pecuniary charges secured by the term. The term is said, in equity, to attend or wait upon the inheritance. On the decease of a person thus entitled to the reversion in fee expectant on the determination of a long term, say of 1,000 years, and also entitled absolutely to the surplus rents and profits of the lands comprised in the term, after payment of a pecuniary charge, such as an annuity to A. for his life, his executor or administrator will take no interest in the term, but, on the contrary, it will attend the inheritance. The heir at law of the beneficiary, in case of his decease intestate, or the devisee under his will of his real estates, will be entitled to the benefit of the term, and will in equity be considered as entitled to the lands in immediate possession, subject only to the payment of the life annuity to A. which the term secures. Terms of years, when used in settlements for the purpose of securing pecuniary charges, thus not only afford no disturbance to the legal seisin, but also make no change in the actual enjoyment. So far as the term is not wanted to secure the charge, so far it is considered in equity to belong to those to whom the freehold would belong if the term were not there.

A satisfied term.

In the case I have put of a term held in trust for securing an annuity to A. for his life, if A. were to die and all arrears of his annuity were to be paid up, the purpose for which the term was created would evidently be satisfied, and the term in this case would be called a *satisfied term*. This is the appellation usually given to terms of years which have fulfilled the purposes for which they were created. A term of this sort was held in equity, even without any express declaration for that purpose, to be attendant upon the inheritance by con-

struction of law, or, in other words, to be the property of the person or persons for the time being entitled to any estate or interest in the reversion expectant on the determination of the term, according to the extent and nature of their estates and interests in such reversion. The term being no longer wanted, the title to the lands subject to the term governed the title to the trust or beneficial interest in the lands comprised in the term. It was, however, usual, in settlements, to provide expressly that when the term became satisfied it should cease to exist. The proviso for cesser was to the following effect:—"Provided always, and it is hereby agreed and declared, that when the trusts and purposes hereinbefore declared shall have been fully performed and satisfied, or shall have become unnecessary, or incapable of taking effect, and when all the costs and expenses of the trustees of the said term shall have been fully paid, then the said term, or so much thereof as shall not have been disposed of for the purposes aforesaid, shall cease and determine." This proviso for cesser of the term on its becoming satisfied is now usually omitted, for all satisfied terms now cease the moment they become attendant upon the inheritance, by virtue of an Act of Parliament for that purpose, to which I shall presently call your attention.

Attendant on the inheritance by construction of law.

Proviso for cesser of term.

Before this Act was passed, a term of years once created continued to exist if not determined by a proviso for its cesser, although the object for which it was created might have come to an end or been satisfied. It might, however, have been made to cease by a *surrender* of the term, made by the trustee or legal owner of the term, to the owner of the immediate reversion or remainder expectant on the determination of the term. This surrender caused a *merger*, or drowning of the term in the reversion or remainder. And so rigidly did the law adhere to its favourite distinction between

Surrender.

Merger.

estates of freehold and terms of years, that it held that if A. were tenant for a term of 1,000 years, and the reversion were settled on B. for his life, a surrender of the term from A. to B. would cause a merger of the term in the life estate, the term, as the lesser estate, in contemplation of law, being drowned in and swallowed up by the freehold estate of B. for his life. So that B. would thus obtain merely an estate for his life in possession instead of in reversion, and after B.'s death his executors would have no interest in the lands during the remainder of the term of 1,000 years, for the term was ended and gone by the merger. If the term were by construction of law attendant on the inheritance, a merger of the term in the first life estate would accomplish the desired end of getting rid of the term, and accelerating all the subsequent estates into immediate possession, as each prior estate of freehold came to an end.

Assignment
of term to
trustee to
attend the
inheritance.

Protection
afforded by
attendant
term.

But terms of years, especially if created a long time ago, were often thought too valuable to be got rid of by surrender. On the occasion of a sale or mortgage of lands, if there were an old satisfied term subsisting, it was the custom of conveyancers to have the term assigned to a trustee, in trust for the purchaser, his heirs and assigns, and to be assigned and disposed of as he or they should direct or appoint, and in the meantime to attend the inheritance of the premises, in order, as it was expressed, to protect the same from all mesne or intermediate charges and incumbrances, if any such there were. The protection afforded by an old term of years was prized, perhaps, more highly than it ought to have been. The title to the term might itself be defective; but if it were not, then, however defective might be the title to the freehold subject to the term, the purchaser had, at any rate, the right to the possession and enjoyment of the land for the whole residue

of the term; for it was vested in his own trustee in trust for himself. A term, of course, was no protection against a defect of title occurring prior to the creation of the term, but against hidden incumbrances created subsequently to the term it was a complete protection, to the extent, of course, only of the duration of the term. I say hidden incumbrances; for if the purchaser bought with notice of any incumbrance, equity would not allow him to avail himself of any prior term to the prejudice of the incumbrancer. There was one solitary case in which equity, departing from its usual principles of rectitude, allowed a purchaser to avail himself of a prior term as a protection against an incumbrance of which he had notice. This was the case of the right of the widow of the vendor or of any former owner, having become such subsequently to the creation of the term, to dower out of the premises. Equity preferred Dower. the convenience of purchasers to the rights of widows, and refused the widow her dower during the term, if a purchaser, however much he may have been aware of the widow's claim, had procured an assignment of the term to a trustee in trust for himself, or a declaration of trust in his own favour from the legal holder of the term (k).

The device of protecting purchasers by means of old outstanding but satisfied terms of years, though sometimes efficacious, was costly and cumbersome. And an Act of Parliament was accordingly sometime since passed by which all terms of years, the trusts of which are satisfied, and which formerly became attendant on the inheritance, now cease *ipso facto* the moment they become satisfied. This Act is the 8 & 9 Vict. c. 112, and is intituled "An Act for rendering the Assignment of Satisfied Terms unnecessary." The first section abolishes all attendant terms then subsisting, with an

Stat. 8 & 9
Vict. c. 112.

(k) See *ante*, p. 90.

attempt at the same time to retain the protection which they then afforded. This section is as follows:—
“Every satisfied term of years which either by express declaration or by construction of law, shall, upon the Thirty-first day of December One thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said Thirty-first day of December One thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term.” As time passes away this section evidently becomes of less and less importance. The next section, however, is in continual operation. It enacts that “every term of years now subsisting or hereafter to be created, becoming satisfied after the said Thirty-first day of December One thousand eight hundred and forty-five, and which either by express declaration or by construction of law shall, after that day, become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine, as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.” In consequence of this enactment there is now no occasion to insert in settlements, in which terms of years are made use of to secure charges, a proviso for the cesser of the term on the trusts becoming satisfied. The statute in this case puts an end to the term.

You will observe that the statute deals only with satisfied terms. A term of years held upon trust for securing a yearly rent-charge, or upon trust for securing a mortgage debt and interest, is not a satisfied term so long as any of the money which it secures remains unpaid. Such a term may still be attendant on the inheritance, either by construction of law, or by express declaration; and by construction of law it is so attendant when its only purpose obviously is merely to secure a pecuniary charge.

Terms not
satisfied.

The securing of money charges by means of long terms of years, though in some respects a clever device, having regard to the feudal principles of our law, is yet not without its inconveniences. Supposing such a term to be, as such terms often have been, actually sold for the purpose of raising the money secured, the purchaser becomes entitled to the lands for the whole residue of the term, and without impeachment of waste, if the term is so limited, and without having any rent to pay. But a term, however long, gradually draws to an end. The temptation, however, is great to treat it as if it were a fee simple. And there can be no doubt that many persons have purchased lands, believing them to be freehold, when in fact they were only held for the residue of a long term of years. The title to the freehold reversion expectant on such a term is also most difficult to establish. Where rent is paid, the receipt of the rent by each successive owner is a badge of ownership. But where no rent is paid, and each successive owner has nothing but a dry reversion, this reversion may be aliened again and again, first to one person and then to another, and the second alienee has no means of finding out that his alienor has already parted with the reversion which he purports to convey.

Inconveni-
ences of long
terms of
years.

Long terms of years held without any rent, though
w.s.

Long terms
created to
evade feudal
rights.

generally created, in the first instance, for the purpose of securing money on land, appear to have been sometimes created, in former times, with a view of eluding the feudal rights of lords of manors in respect of lands held in fee simple. In the reign of Queen Elizabeth it was not unusual for the purchasers of land to take a demise to themselves for the term of 1,000 years, or more, without impeachment of waste, with a covenant from the vendor to convey the fee if required (*l*). Many of these terms are still in existence, and are almost as beneficial as a fee simple. The value of a term as a security is that it gives a right to all the rents and profits of the land for the whole period of the term, whilst, until wanted, it waits upon and goes with the inheritance, and when its trusts are satisfied and it is no longer required, it is put an end to by the Act for rendering the assignment of satisfied terms unnecessary.

In my next Lecture I hope to consider the subject of *portions for younger children*, which portions are usually secured by means of the long terms of years of which I have been speaking to-day.

(*l*) See *Jeffreys v. Machu*, 29 Beav. 344; *Pickett v. Packham*, L. R., 4 Ch. 190.*

LECTURE XVIII.

WE now come to consider the subject of Portions for younger children. I mentioned in a former Lecture (a), that the portions for the younger children were secured by the creation of a long term of years, such as 1,000 years, to commence after the decease of the parents, but to precede the limitation to the use of the first unborn son of the marriage and the heirs of the body of such unborn son. I also mentioned shortly the trusts of the terms which are, out of the rents and profits, or by mortgage, and sometimes by sale of the premises comprised in the term, for all or any part of the term, to raise the sums intended to be provided for the younger children, which sums of course vary according to the amplitude of the estate (b).

The first remark to be made is that the term, *younger children*, if used (which it seldom is in well drawn settlements), is construed, in a provision for children made by parents or by persons in the position of parents, not literally, but as including the children not provided for, though any of such children may be, strictly speaking, the eldest child, and as excluding a child provided for, though that child may not be, strictly speaking, the eldest child. Thus if a man should have three daughters one after the other, and then a son, and if his family estate should be settled on his eldest or only son in tail male or in tail, a provision made by him for his *younger children* would be held to belong exclusively to the three daughters, as the

Younger children, meaning of term.

(a) *Ante*, p. 217.

(b) *Ante*, p. 250.

Form for
describing
children in-
tended to take
portions.

children unprovided for, although literally each one of them is evidently older than the son who was born last. In settlements, the form that was long commonly adopted for describing the children intended to take portions was as follows:—"All and every the child and children of the said A. B., or of the said A. B. by the said C. D. his intended wife, other than and except an eldest or only son for the time being entitled under the limitations hereinbefore contained to the hereditaments hereby settled, for an estate in tail male (or in tail, as the case may be), in possession, or in remainder immediately expectant on the decease of the said A. B.," or "on the decease of the said A. B. and C. D.," if C. D. also has a life estate. This form of trust, though evidently more explicit than the simple term "younger children," has nevertheless given rise to questions as to its meaning, under some of the numerous events which happen in families, and which events it is the duty of conveyancers as far as possible to anticipate.

*Ellison v.
Thomas.*

A question of this kind arose in the case of *Ellison v. Thomas* (c). In this case, by a settlement dated 7th of September, 1814, an estate in Gloucestershire, called the Bibury estate, was limited to the use of Estcourt Cresswell for life, with remainder to the use of Richard Estcourt Cresswell the elder for life, with remainder to the use of Richard Estcourt Cresswell the younger, his eldest son, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the other sons of R. E. Cresswell the elder, successively for life, with remainder to their first and other sons in tail male. And by an indenture of even date a sum of 13,000*l.*, secured by a term of 1,000 years in other estates, was directed to be raised by trustees in trust for the children of the said R. E. Cresswell the

elder then born, or thereafter to be born during his life, or in due time after his decease, other than and besides an eldest or only son for the time being entitled, under the settlement of even date, to the estates thereby settled in possession or in remainder immediately expectant on the death of the survivor of them the said E. Cresswell and R. E. Cresswell the elder, in such manner as R. E. Cresswell the elder should appoint, and in default of appointment in equal shares, sons at twenty-one, daughters at twenty-one or marriage. R. E. Cresswell the younger, who was tenant for life under the settlement, attained twenty-one, married, but had no issue male; and died in the month of April 1837, in the lifetime of R. E. Cresswell the elder, leaving his widow who took out letters of administration to his personal estate. A son of R. E. Cresswell the elder, named William Henry Cresswell, became, in the events which happened, the eldest son of R. E. Cresswell the elder, entitled, in remainder expectant upon the death of the latter, as tenant in tail male of the Bibury estate. The said R. E. Cresswell the elder died on the 21st of May, 1841. The case came first before Vice-Chancellor Kindersley, who made a decree excluding the personal representative of Richard Estcourt Cresswell the younger from participation in the fund (*d*). But, on appeal from this decree, the Vice-Chancellor's judgment was reversed; and it was held that the eldest son was not within the exception to which I have just referred, which was "other than and besides an eldest or only son for the time being entitled under the settlement of even date to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of them the said Estcourt Cresswell and R. E. Cresswell the elder." The Lord Chancellor observed (*e*), "It must be remembered that the trust of

(*d*) 2 Drew. & Smale, 111.

(*e*) 1 De Gex, Jones & Smith, 28.

the 13,000*l.* is for all the children of R. E. Cresswell the elder, except the eldest son for the time being; and, therefore, that R. E. Cresswell the younger is one of the cestui que trusts, unless he be excluded by the exception; and consequently that the exception did not operate or take effect until the time appointed for raising the money, and then attached upon and excluded William Henry Cresswell, who was found to have been the eldest living son of Richard the father, and entitled to the Bibury estate; it follows that Richard E. Cresswell the younger was never taken out of the class of cestui que trusts, and having attained twenty-one when the right to the portions became vested, he was to be considered as a younger child and entitled to a share in the 13,000*l.*"

Swinburne v.
Swinburne.

There is another case to the same effect decided by the late Vice-Chancellor Giffard, namely, *Swinburne v. Swinburne* (*f*). This case was somewhat similar to that of *Ellison v. Thomas*, to which I have already referred. The eldest son attained twenty-one, but died in the lifetime of his grandfather and father, who were both tenants for life of the estates; whilst the second son attained twenty-one and became entitled as tenant for life in possession on the death of his grandfather. It was held that, under these circumstances, the personal representative of the eldest son was entitled to a share in the portions, notwithstanding the fact that, by the settlement, he had a separate provision for his life in the events which happened by way of rent-charge. And it was also held that the second son, who became entitled to the estates as tenant for life in possession, was not entitled to share in the fund provided for portions. This decision carries the doctrine of *Ellison v. Thomas* a long way, and suggests the propriety of ex-

(*f*) 17 Weekly Reporter, p. 47.

cluding from a portion an eldest son, who may be provided for by way of rent-charge, if such should be the intention of the parties.

There is another case on this subject which came before the House of Lords, and which shows that, in construing provisions of this nature, the courts will, if possible, conform to the apparent intention of the parties, rather than hold strictly by the exact words which they have used. The case is *Collingwood v. Stanhope* (g). *Collingwood v. Stanhope.* In this case, Edward Collingwood was, under a will made in 1805, tenant for life of certain real estates, with remainder to the use of his first and every other son successively in tail male. On his marriage a settlement was executed, by which a certain trust fund was vested in trustees for himself and his intended wife for their lives, and after the decease of the survivor of them, in trust for the children of the marriage, other than and except an eldest, second, or only son, for the time being entitled under the will of 1805 (being the will by which the estates were settled) to the manor and premises thereby devised for an estate in tail male in possession or remainder immediately expectant on the death of Edward Collingwood, to be held for the children in such manner as the parents or the survivor should appoint, and in default of appointment in trust for the children equally, sons at twenty-one, and daughters at twenty-one or marriage, in the usual way. The marriage took place, and there were three children, Edward Collingwood the younger, and two daughters, Arabella and Cecil. Mrs. Collingwood died in 1840. Edward Collingwood the son attained twenty-one in 1844, in the lifetime of his father. In the month of February, 1846, the father and son joined in a disentailing deed, in the manner which I explained in a former Lecture (h),

(g) L. R., 4 H. of L. 43.

(h) *Ante*, p. 215.

reserving to themselves a joint power of appointment; and on the next day they, in exercise of their power, limited the premises to the intent that the son should receive an annual rent-charge of 500*l.* for the joint lives of himself and father, and subject thereto, to the use of Edward Collingwood the father for life, by way of restoration of his former life estate therein, with remainder to the use of the son for life, with remainder to the use of his first and other sons in tail, with an ultimate remainder to the use of the right heirs of the son:—thus following the mode of dealing with the estates which I explained in my fifteenth Lecture (i) as the customary mode of resettling family estates, so as to preserve them, as long as possible, in the line of the eldest son. In the year 1856 the father, in exercise of the power of appointment reserved to him by his marriage settlement, appointed one-half of the trust fund to his daughter Arabella on her marriage. The cause came first before Vice-Chancellor Wood (k). The Vice-Chancellor declared that, according to the true construction of the deed of settlement, and in the events which had happened, the unappointed moiety of the trust funds was equally divisible between Edward Collingwood the son and his sister Miss Cecil Collingwood. But on appeal to the House of Lords, this was reversed; and it was held by the House, including among them the Vice-Chancellor himself, then Lord Hatherley, that the daughter Cecil was entitled to the whole of the unappointed fund. The broad principle on which this was decided was, that the son did in fact become entitled to the family estate. Admitting that the character of eldest son was to be ascertained at the time of the distribution of the fund, yet it was held that here the son was to be treated as the eldest son, entitled under the will, and consequently was not en-

(i) *Ante*, p. 217.

(k) L. R., 4 Eq. 286.

titled to a share of the trust fund. It was held that his concurrence in the re-settlement of the estate, and his taking under such re-settlement a mere life estate, instead of the estate in tail which was given him by the will, did not affect the character of *eldest son entitled under the will* to an estate in tail, which belonged to him when he came of age.

You will remember that in the settlement of which I spoke in a former Lecture (1), I called your attention to the fact, that the term of 1,000 years for securing the portions to the daughters and younger sons was inserted in the settlement prior to the insertion of the limitations to the use of the first and other sons of the marriage in tail male. The consequence of this position of the term is, that the eldest son, when he comes of age, takes subject to the portions and to the term of years created for the purpose of securing them, and cannot, by a disentailing deed, deprive his sisters and younger brothers of the portions intended for them. If the term were placed subsequently to the limitations to the first and other sons successively in tail male, then it would be in the power of the son, when he came of age, with the consent of his father, the first tenant for life, as protector of the settlement, to enlarge his estate tail into an absolute estate in fee simple, and so to deprive his sisters and younger brothers of the portions secured by the term. Now sometimes it is desired that, on failure of male issue of the marriage, the estates themselves should not go to the daughters of the marriage, if any, but that they should then be limited to the use, either of some brother of the settlor, and the first and other sons of such brother, or to the use of some other collateral male branch of the family; but that such brother or

Term for portions prior to estate tail of eldest son.

Additional portions on failure of issue male.

(1) *Ante*, p. 217.

Mode of
securing
additional
portions.

collateral or other male branch of the family should in that case take the family estate subject to an increased sum by way of portions, to be secured to the daughters of the marriage. Now in that case the only way in which the intention can be effected is to create another term of years, and to place that term of years after and not before the limitations to the use of the first and other sons successively in tail male. True it is, that the term being placed after the estate tail may be defeated by a disentailing deed executed by the eldest son, with the consent of his father as protector, at any time after his coming of age. But this contingency it is impossible to guard against. In some cases an attempt has been made to guard against this contingency by attempting to use the term, say of 1,000 years, which precedes the limitation to the first and other sons successively in tail male, as a means of securing, not only the portions intended for the daughters and younger sons in the first instance, but also the additional portions intended to be secured for the daughters, in the event of the failure of the issue male of the marriage. But there is a fatal objection to this course of proceeding. The issue male of the marriage may fail at any distance of time. The eldest son may not bar his entail, but leave it to descend to his eldest son; and he again may not bar the entail, but may leave the estate to descend to his eldest son, and so on for generations. The term of 1,000 years preceding the estate tail to the eldest son all the while hangs over that estate, and the trust of that term is, that, so soon as the male issue of the marriage fail, additional portions will be raised for the benefit of the daughters. This trust is evidently one which is void for remoteness; it tends to a perpetuity; and as I have mentioned in a former Lecture (*m*), any limitation, whether at law or

Remoteness.

(m) *Ante*, pp. 29—31.

in equity, whether in the shape of a legal estate or of a trust, which, under any circumstances, may possibly exceed the limit of a life or lives in being at the date of the settlement and twenty-one years after, including the period of gestation, should it exist, is absolutely void.

If, therefore, you should endeavour to effect the intended object by securing the additional portions, to take effect on the failure of the male issue of the marriage, by a term of years, which precedes the estate tail, and so cannot be cut off, you will defeat your own object; because you will transgress the rule against perpetuities. But, it may be said, do you not provide for an event equally remote when you attempt to secure the additional portions by a term of years placed subsequently to the estate tail, or more technically in remainder after it? No doubt you do. The event to be provided for may arise at a period long exceeding the limit of perpetuity. But there is this exception to that rule. The law takes notice of the fact that an estate tail is liable to be barred; and it consequently allows limitations and trusts to be placed after an estate tail, which, in respect of remoteness, would be wholly invalid if placed before it. After the death of the father, which is a life in being, and after a term which cannot exceed twenty-one years from his death, viz., after his eldest son has attained twenty-one, the whole of the limitations of the settlement subsequent to the son's estate tail may be cut off by a disentailing deed; and, being so liable to be cut off, the law permits limitations which, under other circumstances, would be void for remoteness, to be limited in remainder after the determination of the estate tail. It considers that the reason of the rule against perpetuities does not apply to such cases; inasmuch as, however remote the event may be on which such limitations are to take

Exception to rule as to perpetuities where an estate tail precedes.

effect, the limitations may always be defeated by the concurrence of the father and son in a disentailing deed.

*Case v.
Drosier.*

The leading case on this subject is that of *Case v. Drosier* (*n*), decided by Lord Langdale when Master of the Rolls, and affirmed on appeal by Lord Chancellor Cottenham (*o*). The marginal note of the case in Keen's Reports tersely expresses the point decided. It is this:—"The trust of a term limited previous to an estate tail for raising extra portions on the death of a party without issue, was held invalid as tending to a perpetuity, because, being limited antecedently to the estate tail, it could not be defeated by a recovery." A recovery, you may remember, was the means by which an estate tail and the remainders after it, were barred and defeated prior to the Act 3 & 4 Will. IV. c. 74, for the abolition of fines and recoveries and for substitution of more simple modes of assurance (*p*). Since that Act the same effect is produced by a disentailing deed, executed by the son, with the consent of his father as protector of the settlement, and enrolled in Chancery within six calendar months (*q*). The Lord Chancellor, in his judgment on the appeal (*r*), adverts to the objection which might be made if the term were limited in remainder after the estate tail, viz., that the trust would be equally remote. "Why," says he, "is such a charge not void for remoteness? Merely because, being after an estate tail, it is barrable by recovery; but in this case the 2,000*l.*,"—which was the sum in question,—"*is* charged upon or is part of a term anterior to the estate tail, and, therefore, not barrable by recovery, but to be enjoyed only upon the failure of the issue male." And further on:—"If the term and the charge be not

(*n*) 2 Keen, 764.

(*o*) 5 My. & Cr. 246.

(*p*) See Lectures on the Seisin

of the Freehold, pp. 156, 157.

(*q*) *Ibid.*, p. 173.

(*r*) 5 My. & Cr. 248.

barrable by recovery, then there is no ground for contending that the charge is not too remote."

This case was followed by that of *Sykes v. Sykes* (s), *Sykes v. Sykes.* decided by the late Vice-Chancellor Wickens, who spoke of the case of *Case v. Drosier* as one of the highest authority, from the care with which it was argued, and the judges by whom it was decided. The case of *Sykes v. Sykes* was as follows:—Joseph Sykes, by his will, dated in 1803, gave lands in the county of York to his son Richard Sykes for life, without impeachment of waste, with remainder to the use of his grandson Richard Sykes, the eldest son of his son Richard, during his life, without impeachment of waste, with remainder to trustees and their heirs during the life of his said grandson, upon trust to preserve contingent remainders; and after the decease of his grandson, then to the use of trustees, their executors, administrators and assigns, for the term of 500 years thence next ensuing upon the trusts thereafter expressed; and from and after the end or sooner determination of the said term, and in the meantime subject to the trusts thereof, to the use of the first and other sons of his grandson successively in tail male, with remainder to the use of the second, third, and all and every other the sons of his son Richard successively in tail male; and in default of such issue, then to the use of his the testator's son Nicholas during his life, without impeachment of waste, with remainder to trustees and their heirs during the life of Nicholas, upon trust to preserve contingent remainders; and after the decease of Nicholas, then to the use of the first and other sons of Nicholas successively in tail male, with subsequent limitations of the same kind to his, the testator's, sons Daniel, Henry and John, and for their

sons successively, in terms similar to those expressed in regard to his son Nicholas and his sons, with other remainders over. The testator then declared the trusts of the above-mentioned term of 500 years to be, that in case any one or more of his younger sons or their respective issue should become seised in possession, by virtue of the limitations, of the hereditaments therein-before devised to his son Richard for life, *with remainder over for want of issue male of his body*, that the trustees should, by mortgage or other means, raise the sum of 5,000*l.* for the benefit of such of the testator's sons (save and except such son as should be seised in possession) as should be then living, or their issue if dead; such issue to take the respective shares of their parents in equal proportions if more than one; but if only one to such only son or his issue. The testator's eldest son Richard had no other son than his son Richard mentioned in the will. Richard Sykes the son entered into possession of the estates on his father's death, and died in 1832. His son Richard Sykes, the grandson of the testator, upon the death of his father entered into possession of the estates, and continued in such possession until his death in 1870, without ever having been married, and consequently without ever having had any issue. The next tenant for life was Nicholas Sykes, and he died in 1827, and therefore did not come into possession. The eldest son of Nicholas, who was the next in remainder, died a bachelor, and therefore without issue. But his second son, Joseph, who died in 1857, had ten children, the eldest of whom died a bachelor; but his second son, who died in 1865, had three children, and the eldest, Charles Percy Sykes, an infant, was the defendant. The defendant was by his guardians in possession of the estates which had, in the events that happened, been settled on Nicholas Sykes for life with remainder to the first and other sons of Nicholas successively in tail male. And the defendant was, as we

have seen, the grandson and heir male of the body of Joseph, who was the second son of Nicholas. The term of 500 years, as you will observe, was limited prior to the estate in tail male given to the first and other sons of the grandson Richard; and also prior of course to the subsequent limitations to the second and other sons of the son Nicholas in tail male; and of course prior to the estate which descended on Charles Percy Sykes as the grandson and heir male of the body of the second son of Nicholas. The bill was filed for the purpose of having the sum of 5,000*l.* intended to be secured by the term of 500 years raised out of the estate, which had descended on Charles Percy Sykes, subject to the term of 500 years. And if there had been no question of perpetuity, there can be no doubt that, the term having preceded the estate tail, the owner of the estate tail took subject to the trusts of the term. It was, however, held that the trusts of the term for raising the above mentioned sum of 5,000*l.* were void for remoteness. The trusts were only to take effect in case any of the younger children or other issue became seised of the premises under the limitations of the testator's will. And this could only happen on the failure of the issue male of Richard the son. Now the failure of issue male of Richard the son is an event which might have happened at any distance of time. As it happened in fact, he had but one son, Richard the grandson; and he died a bachelor, and, therefore, without issue male. So that, in the event which happened, the trusts of the term took effect at the expiration of a life in being at the time of the death of the testator. But the rule of perpetuity provides that if a limitation *may under any circumstances* arise beyond the term limited by the rule, viz., a life in being and twenty-one years afterwards, including the time of gestation, if gestation exist, then the limitation or trust is wholly void. And the court, following the decision of *Case v.*

Drosier, allowed a demurrer for want of equity, which was put in by the defendant to the bill. The result, therefore, was that the intention of the testator was wholly defeated, and that the 5,000*l.* intended to be secured by the term of years could not be raised. The term should have been inserted after the limitations to the use of the second and other sons of the testator's son Richard in tail male, and before the limitation to the use of Nicholas the next son for his life. In that case, the sons of Nicholas and their issue male would have been bound by the trusts of the term; and, as the term might have been defeated by a disentailing deed executed by any prior tenant in tail male, with the concurrence of the protector of the settlement, the objection to the charge on the score of perpetuity would have been avoided.

In my next Lecture I hope to consider the subject of the *satisfaction* of portions by legacies, and of the *ademption* of legacies given for portions in a will by a subsequent provision of a portion made by the testator in his lifetime.

LECTURE XIX.

IN many settlements, which provide charges for portions for younger children, there is contained a provision to the effect that, in case the father and mother, or either of them, shall, at any time or times *during their lives*, or the life of the survivor of them, *advance* or pay any sum or sums of money to or for the use or benefit of any younger child or children, for whom a portion or portions is or are thereby intended to be provided, then and in such case, and unless the contrary shall be directed by them or the survivor of them by deed or writing, the sums so advanced for the use of such younger child or children shall be deemed in full or part satisfaction, as the case may be, of the portion or portions to which such child or children would otherwise have been entitled. Provisions of this sort have led to a great deal of litigation, as to what should, and what should not, be deemed an *advancement* within the meaning of a clause of this sort. And the history of the decisions is curious, as showing how great is the deference to authorities paid by English lawyers, and how great an influence a mere mistake, which once creeps in, may have upon the interests of persons entitled under settlements construed by courts so deferential to authority. You will find a history of the cases in the judgment of Lord Selborne in the case of *Cooper v. Cooper* (a).

Provision that advancements by parents shall be in satisfaction of portions.

Advancement, what is.

It appears that in a case of *Leake v. Leake* (b), the late Sir Samuel Romilly, then Mr. Romilly, and other

(a) L. R., 8 Ch. 313.

(b) 10 Ves. 476

Advancement
in lifetime.

counsel admitted in error, contrary to the interest of their own client, that a provision made, in a case of this kind, *by the will* of the father, must be considered as a provision given by him *in his lifetime*; citing as authorities for this proposition two cases, which, when looked into carefully, do not appear by any means to have decided such a point. But, on the contrary, one of them contained an expression of an opposite opinion by Lord Eldon; he having remarked that, though it is true the will must be made in the life, it is equally true that nothing is advanced or given to the party to take till after the death. Common sense certainly will say that, where a father leaves to his child money by his will, he does not make to that child an advance in his lifetime. Nevertheless, the erroneous admission of these eminent counsel seems to have given rise to an opinion in the profession that, in every case where there is a provision that an advancement by the parent in his lifetime to the use of a younger child shall be taken in satisfaction *pro tanto* of the portion of such child, a bequest to a child by will must, on the authorities, be considered an advance by the parent in his lifetime, contrary to the common sense and reason of the case.

Cooper v.
Cooper.

In the particular case of *Cooper v. Cooper* (c), it was provided that in case the parents or either of them should at any time, during their joint lives or the life of the survivor of them, advance or pay any sum or sums of money for the use or benefit of any younger child or children, for whom portions were provided, then and in such case unless the contrary should be directed by the parents or the survivor of them, by *deed or writing to be sealed and delivered in the presence of one or more witnesses*, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children. And, on the supposed

authority of the decisions, it was strenuously argued that legacies given by the will of the surviving parent to his younger children were to be taken in part satisfaction of their portions. But the court held the contrary; and considered that the legacies given to the children under the will were not to be taken towards satisfaction of their portions.

There exists, therefore, no absolute rule of construction that, in provisions of this kind, an advancement by will is to be considered as an advancement in the lifetime of the testator. The clause respecting advancement is to be construed according to its obvious meaning, and may or may not extend to testamentary provisions. The difficulties which have arisen on this subject, suggest the precaution that, in framing a clause making advancements by the parents to be in satisfaction of portions, it should be clearly made to appear whether a testamentary provision is intended or not to be a satisfaction of the portions.

Advancement by will not necessarily advancement in lifetime.

It is plain that, if there should not be any clause of this kind, an advancement by the parent, either in his lifetime or by his will, will be in addition to the portions provided by the settlement; with this exception, that, in case, as sometimes happens, the property remains the property of the father, and is not settled on his eldest son and his issue, or otherwise, then the case falls within authorities—which I shall presently mention—in which it is held that, where a parent himself makes provision either by bond or out of his own property for his children, the presumption is that he does not intend to give them double portions, but that a second portion given by will is intended to be in satisfaction of a former portion.

Additional advancement.

Exception where property belongs to the father.

Where there is a clause of the kind that I have men-

Effect of advancement.
Portion sinks.

Noel v. Walsingham.

tioned, making an advancement by the parent to be a satisfaction *pro tanto* of the portion of the child, the effect of the advancement is, that the portion sinks into the estate for the benefit of the eldest son and his issue. This is clearly laid down by Sir John Leach when Vice-Chancellor in the case of *Noel v. Walsingham (d)*. Speaking of the case before him he observes: "By the terms of the settlement, any advance made by the father in his lifetime was to be taken in or towards satisfaction of the portion provided by the settlement for a younger child, unless the father should declare the contrary. I apprehend the true construction of this provision is that, if the father make an advance to an object of the settlement, without any declaration of intention in respect to it, the advance operates to the exoneration of the estate charged with the portion; but that the father is at liberty to declare that the child advanced shall notwithstanding receive its full portion, or is at liberty to consider himself *pro tanto* the purchaser of the portion, and to declare in effect that it shall remain a charge upon the estate for his benefit." The father may, if he pleases, bargain with his child that the advancement he makes shall be the price of the child's portion; but if he does not, then the advance sinks into the estate for the benefit of the eldest son, unless the father should think fit to declare that the child shall have what the father pleases to give him, in addition to his portion under the settlement.

Where the property, on which the portion is charged, is not in settlement, but is simply the property of the father, charged with the portion, or where, as frequently happens, a father, on the marriage of a child, binds himself by bond or covenant to pay a certain sum of money to the trustees of the settlement as a portion for

(d) 2 Sim. & Stu. 99, 110.

his child, questions arise not unfrequently with respect to testamentary provisions made for the child by the parent either after or before the date of the settlement. If, after having bound himself, or charged his estate, on the marriage of a child, with a portion for that child, the father afterwards makes a testamentary provision for that child, such provision will usually be considered as intended to be a *satisfaction* of the portion agreed to be given to the child by the settlement; and this doctrine applies, not only to a parent, but to provisions made by any person standing *in loco parentis*.

Satisfaction of portions secured by parent or by person *in loco parentis*.

There are two cases on this subject to which I think I may beneficially call your attention. The first is the case of *Lady Edward Thynne v. The Earl of Glen-gall* (e). William Mellish, a rich commoner, had two daughters and only children, one of whom married Lord Edward Thynne on the 8th July, 1830. And, on the occasion of the marriage, her father agreed to give her a portion of 100,000*l.* stock; and he accordingly transferred one-third part of that sum in stock to the four trustees of her marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death. The one-third actually transferred was to be held in trust to pay the income to Lord Edward Thynne during his life, and after his decease to the Lady Edward Thynne for her life, and after the decease of the survivor of them, the trustees were to apply the capital of the bank annuities for the benefit of the child or children of the marriage as Lord Edward Thynne and Lady Edward Thynne should jointly appoint, or in default of such appointment as the survivor alone should appoint, and in default of such appointment then in trust for the children of the marriage. As to the remaining two-thirds of the

Lady Edward Thynne v. Earl of Glen-gall.

(e) 2 H. of L. Cas. 131.

portion, the trustees were to pay the income for the separate use of Lady Edward Thynne, without power of anticipation, during the joint lives of her husband and herself, and after his decease then to pay the income to her and her assigns during her life, and after her decease these sums, whether Lord Edward Thynne should be then living or not, were to be in trust for the children of the marriage, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under it with the consent of their parents, in such manner as Lord Edward Thynne and Lady Edward Thynne should, during their joint lives, by deed appoint; and, in default of appointment, in trust for the children of the marriage, sons at twenty-one, daughters at twenty-one or marriage with consent as aforesaid. If there were no children of the marriage, then, after the decease of the survivor of Lord and Lady Edward Thynne, the whole of the funds were to be in trust for William Mellish for his absolute use. William Mellish three years afterwards made his will, dated the 10th of November, 1833, whereby he bequeathed a moiety of the residue of his personal estate, subject to certain annuities and legacies, to trustees, who were two of the four trustees of his daughter's marriage settlement, in trust to pay the income to Lady Edward Thynne for her life for her separate use, and after her decease, in trust for her children in such shares as *she* should by deed or will appoint; and, in default of such appointment, then to her children equally, sons to take vested interests at twenty-one, and daughters at that age or marriage; and, in case she should have no children, then upon similar trusts for his other daughter, who afterwards became Countess of Glengall. Mr. Mellish died in the month of January, 1834. And the bill was filed for the purpose of carrying the trusts of his will into execution. The moiety of his residuary personal estate

bequeathed by his will considerably exceeded the two-thirds of the 100,000*l.* stock secured by his bond. And the question then arose, whether or not the bequest made by Mr. Mellish of a moiety of the residue of his personal estate upon the trusts above mentioned for the benefit of Lady Edward Thynne and her children was or was not intended as a satisfaction of the bond, which he had given on her marriage, for the transfer of two-thirds of the sum of 100,000*l.* stock agreed to be settled by him. The cause came first before Lord Langdale, Master of the Rolls (*f*), and his lordship decided that Lady Edward Thynne was not entitled both to the two-thirds of the 100,000*l.* stock comprised in her father's bond, and to the moiety of his residuary personal estate bequeathed in favour of herself and children by his will; but that the moiety of the residue given by the will was a *satisfaction* of the sum of stock secured by the bond, notwithstanding that the trusts of the two did not in all respects correspond. And this decision was affirmed by the House of Lords (*g*). When it is said that the bequest was a satisfaction of the bond, it is not meant that the bond was not to be enforced, or that the trusts of the stock thereby agreed to be settled were not to be carried out; but the meaning is, that the bequest must be taken as having been made in satisfaction of the bond, so that the stock secured by the bond was payable, not out of the testator's general residuary estate, but exclusively out of that moiety of it which he had bequeathed upon trusts for Lady Edward Thynne and her children. This is a very strong case, and shows how decided is the leaning of the courts against double portions. Being a decision of the House of Lords, it is of course a binding authority in all cases of this nature.

(*f*) 1 Keen, 769.

(*g*) 2 H. of L. Cas. 131.

*Lord
Chichester v.
Coventry.*

The next case to which I wish to call your attention is that of *Lord Chichester v. Coventry*, which is also a case decided by the House of Lords (*h*). In that case the House of Lords reversed the decision of Vice-Chancellor Wood, now Lord Hatherley (*i*), and held that the gift by the will, in the particular case, was *not* a satisfaction of a covenant by the testator contained in the marriage settlement of one of his daughters. On appeal to the Lords Justices (*k*), Lord Justice Knight Bruce agreed with the Vice-Chancellor, but Lord Justice Turner disagreed with him; and an appeal was then brought to the House of Lords. The case was this:—In the year 1844, Mr. Henry Bevan, on the approaching marriage of his daughter Caroline Mary, afterwards Lady John Chichester, covenanted to pay to the trustees of her settlement a sum of 10,000*l.* three calendar months after demand thereof in writing, with interest in the meantime at the rate of three pounds per cent. per annum from the date of the settlement. He also covenanted to pay to the trustees of her settlement a yearly sum of 1,700*l.*, so as to make, with the interest of the 10,000*l.*, 3*l.* per cent., a sum of 2,000*l.* a year, the whole to be settled on the trusts thereafter declared. The trusts were, during the joint lives of Lord John Chichester and Caroline Mary Bevan, to pay to her 200*l.* per year for pin money, for her separate use, free from the control of her husband, and then to pay the residue to Lord John Chichester; and after the decease of either of them, to pay the whole income to the survivor, and after the decease of the survivor, then in trust for the children. If there were no child of the marriage, which was the event which happened, then in trust for Lady John Chichester absolutely, if she should survive her husband; but, if she died in his lifetime, it was then to be held upon such trusts as she should by

(*h*) L. R., 2 H. of L. 71.

(*i*) 2 Hem. & Mil. 149.

(*k*) 2 De Gex, Jones & Smith,
333.

will, notwithstanding coverture, appoint, and in default of appointment, for her next of kin. This sum of 10,000*l.* was never demanded in the lifetime of Mr. Bevan; but the interest on it was regularly paid, together with the yearly sum of 1,700*l.* according to the provisions of the settlement. Mr. Bevan had only two children, both of whom were daughters, viz., Lady John Chichester and a Mrs. Paul. In 1859 Mr. Bevan made his will, whereby he gave a house at Twickenham to Lady John Chichester, and another house to Mrs. Paul, both independent of their husbands. And, after other bequests, he gave all his real and personal estates to the trustees of his will, in the first place to satisfy his just debts, funeral expenses and legacies, and to invest the residue in parliamentary stocks or real securities, with power to vary the investments, and to pay one moiety of the interest to Lady Caroline Mary Chichester for her sole use, independent of her husband, and after her decease, in case Lord John Chichester should be living, then in trust for such persons (other than Lord John, so that he should neither directly nor indirectly take any interest under any appointment) as she should appoint. In case he should die in her lifetime, then the moiety was to be subject to her appointment generally. The testator made similar provisions with respect to his other daughter Mrs. Paul, as to the other moiety of the residue. If no appointment was made by either lady, the residue in each case was to go to the testator's nephew Charles James Bevan. And lastly he declared his express intention to be that no part of his will should be construed to give any interest in his estates to Lord John Chichester or Mr. Paul in their own right, or in the right of his daughters. And he declared that, in case any part of his effects, or any interest therein, should be adjudged, by any construction of his will, or by operation of law, to be liable to be vested in Lord John Chichester or in Mr. Paul, he gave such part or

interest to his trustees in trust for his nephew Mr. Charles James Bevan. The testator died in September, 1860, and the residue bequeathed by his will was very considerable. The question was whether the 10,000*l.* secured by the settlement was first to be paid, and then that Lady John Chichester should receive a moiety of the residue; or whether Lady John Chichester was only entitled to the remainder of a moiety of the residue, after payment of that sum out of such moiety; whether, in fact, the 10,000*l.* was or was not intended to be satisfied by the gift of a moiety of the residue. And the House of Lords decided that the 10,000*l.* was to be paid first, as a debt of the testator out of his personal estate; thus making a different decision from that which was come to in the case of *Lady Edward Thynne v. The Earl of Glengall*.

Reason for
difference in
the above de-
cisions.

The reason for the difference between the two decisions was the difference in the trusts. In the case of *Lady Edward Thynne v. The Earl of Glengall*, the trusts of the two-thirds of the 100,000*l.* stock were for the daughter for life for her separate use, and after her death for the children of the marriage as she and her husband should jointly appoint. The trusts of the will of the moiety of the residue of the estate of Mr. Mellish were for Lady Edward Thynne for life for her separate use; and the only difference was, that, after her decease, this moiety was to be in trust for all her children, including therefore children by any future marriage, and in such manner as she alone should appoint. But in the case of *Lord Chichester v. Coventry*, the trusts of the 10,000*l.* secured by the marriage settlement, and of the moiety of Mr. Bevan's residuary personal estate, were totally different; notably in this—that, under the settlement, Lord John Chichester had the first life interest in the whole fund, subject only to a yearly sum of 200*l.* for pin money payable to his wife for her

separate use; and, by the will of Mr. Bevan, as we have seen, Lord John Chichester was carefully excluded from every interest.

The cases above mentioned are cases of satisfaction of portions by legacies. In these cases a portion is settled prior to the will; and the question arises whether the benefit given by will is or is not intended as a satisfaction of the portion secured by the settlement. There is, however, another class of cases, in which the will is made first and the settlement afterwards. The father by his will bequeaths a portion upon trust for his child and his child's children; and afterwards, on the marriage of such child, settles a sum of money on that child and the children of that child. In these cases also the leaning of the courts against double portions strongly prevails, notwithstanding material differences between the will and the settlement. These cases are called cases of *ademption* rather than cases of satisfaction. *Ademption.* The gift contained in the will is said to be *adeemed* or taken away, by the engagement subsequently entered into on the occasion of the marriage of the child. But the principle both of satisfaction and *ademption* appears to be the same, namely, the presumed intention of every parent to give to each child one portion or provision only. *The principle of satisfaction and ademption the same.*

One of the leading cases on the doctrine of the *ademption* of a bequest of a portion by a subsequent settlement is that of *Lord Durham v. Wharton* (1). In this case a decree was first made by Vice-Chancellor Shadwell (m). This decree was affirmed by Lord Brougham, then Lord Chancellor (n). And subsequently both the decrees of the Vice-Chancellor and the Lord Chancellor were reversed by the House of

(1) 3 Clark & Fin. 146.

(n) 3 My. & Keen, 472.

(m) 5 Sim. 297.

Lord Durham v. Wharton.

Lords (o). The case was this. William Lambton, by his will dated in 1772, devised his real estate to trustees for a term of 1,000 years, in trust to raise 15,000*l.*, which he directed to be equally divided amongst his three nephews and nieces, the children of his brother John Lambton, thus making 5,000*l.* apiece, with interest at 3*l.* per cent. Subject thereto he devised his estates to his brother John Lambton in fee. John Lambton made his will in 1788, and thereby bequeathed 10,000*l.* to trustees in trust for his daughter Susan Mary Anne for life, and after her death in trust for her children in the usual way; and he declared that that sum and other sums settled by his will on his other children should be over and above the three sums of 5,000*l.*, making 15,000*l.* devised to his children by the will of his brother William Lambton. Susan Mary Anne afterwards married John Wharton, Esq.; and by articles made previously to her marriage, dated 9th of October, 1790, after reciting that it had been agreed in consideration of 15,000*l.* which John Lambton had agreed to give J. Wharton as a marriage portion to his daughter, John Wharton should secure to her during their joint lives a yearly sum of 500*l.* for pin money, and should also secure to her a jointure of 1,200*l.* per annum, and should secure portions for the daughters and younger sons of the marriage, Mr. Wharton covenanted that, in case the marriage should take effect, he would pay the pin money and secure the jointure, and also secure portions for the younger children of the marriage in the manner provided by the articles. And it was declared that the portion of 15,000*l.* given to Mr. Wharton was in satisfaction of all sums of money which Miss Lambton should claim by virtue of the will of her uncle William Lambton. Of course no mention was made of the 10,000*l.* be-

queathed to her by her father's will, because her father was then living. John Lambton died in 1794. The question then arose, whether the settlement, made by the articles we have just referred to, on the marriage of Susan Mary Anne, was or was not to be taken to have adeemed the legacy of 10,000*l.* which the father had, at the date of the settlement, already bequeathed upon trusts for his daughter and her children. The will, you will observe, was dated in 1788, two years before the daughter's marriage; but of course it did not come into operation until the father's death in 1794. And the court held that, notwithstanding the fact that by the will the 10,000*l.* was given for the daughter for life, and then to her children, and was to be in addition to the sum to which she was entitled under William Lambton's will, yet nevertheless that this 10,000*l.* legacy was adeemed by the marriage portion given to the husband, in consideration of which he secured his wife's pin money and a jointure, and also portions, not for all the children of the marriage, but only for the daughters and younger sons. This case shows that notwithstanding very great differences between the provisions of a previous will in favour of a child, and of a subsequent settlement made by the testator on the marriage of that child, the provisions made on the marriage will be considered as an ademption of the provisions made by the will.

Another instructive case on the subject of ademption of testamentary portions is that of *Cooper v. Macdonald* (p), a decision of Lord Selborne, which was as follows:—A testator by his will, after directing his debts to be paid, gave a share of his residuary estate upon trust for one of his daughters for life, with remainder to her children as tenants in common, with

*Cooper v.
Macdonald.*

remainders over in favour of the other children of the testator. Subsequently to the date of the will the daughter married; and, upon the occasion of the marriage, a settlement was executed, to which the testator was a party, and by which, after a recital of an agreement by the testator to give his daughter a portion of 5,000*l.*, whereof 1,000*l.* was to be paid to the husband, and 4,000*l.* to be a provision for the daughter, her husband and their issue, the testator covenanted to pay 4,000*l.* to the trustees, in his lifetime, or within two years after his death, to be held upon trusts for the benefit of the husband and wife and their children; and in case of there being no issue of the marriage who should attain twenty-one, then as the testator should appoint, and, in default of appointment, for his next of kin. The sum of 1,000*l.* was paid to the husband, who died leaving his wife surviving him. No child of the marriage lived to take a vested interest under the settlement. It was held that the gift of a share of the residue in favour of the daughter was adeemed to the extent of the 4,000*l.* covenanted to be paid by the testator; but that there was no redemption as to the 1,000*l.* given to the husband absolutely. Lord Selborne observed that the question was one of *ademption* and not of *satisfaction*, the will being prior to the settlement. The direction that all the testator's debts were to be first paid out of his residuary estate (the 4,000*l.* payable under his covenant with the trustees of the settlement being of course one of his debts), was, under these circumstances, of no importance. As to the 1,000*l.*, which was paid absolutely to the husband, his lordship was of opinion that it was not an redemption of any part of the share of residue given to the daughter for her life, with remainder to her children, by the testator's will. Nothing was directly given to the husband by the will; and, by the contract of marriage, no interest in this 1,000*l.* was settled on the daughter or

her children. "The court," his lordship observed, "has been in the habit of disregarding differences in the manner of settling gifts on a child or child's family by different instruments, which raise the question of ademption or satisfaction, when such differences happen to be in their nature consistent with the presumption that the one gift is meant to be substituted for the other. But I am not aware that this presumption has ever been held to arise, in the absence of express direction, when the persons taking under the several instruments are themselves altogether different."

On the subjects of satisfaction and ademption, I have contented myself with laying down the broad principle, which appears to me to be common to both, and stating a few of the leading cases. It is by no means easy to reconcile all that has been said on this subject. Future decision may, perhaps, make the law clearer.

LECTURE XX.

Limitations
to first and
other sons.

Lord St.
Leonards'
Handy Book.
Modes of
settlement.

Sons.

Daughters.

SUBJECT to the life estate of the parents, and to the term of years for securing the pin money and jointure of the wife, and the portions of the daughters and younger sons of the marriage, the settlement, as you remember (*a*), goes on to limit the estate to the use of the first and other sons of the marriage, or, as the case may be, to the use of the first and other sons of the settlor by his intended or any future marriage, severally and successively in tail male or in tail. But the limitations of course vary according to the circumstances of the family and the wishes of the parties. "The common settlement on a marriage," says Lord St. Leonards in his valuable Handy Book on Property Law (*b*)—"The common settlement on a marriage of the intended husband's real estate, is to the husband for life, then to secure the wife's jointure and the younger children's portions, and, subject thereto, to the first and other sons successively in tail; and then to the daughters, as tenants in common in tail, with cross-remainders in tail, and ultimately to the husband in fee. The operation of such a settlement is to give the estate after the husband's death, subject to the jointure and younger children's portions, to the eldest son, and after him to his issue *ad infinitum*; and if they fail, to the other sons and their issue successively in like manner. If they all fail, then the daughters take equally, and the share of each daughter goes to her issue in like manner; but if there is a failure of issue of any daughter, her share goes over to the other daughters and their issue. If all the

(*a*) *Ante*, pp. 212, 213, 217.

(*b*) Page 137, 7th ed.

children die without issue, the estate reverts to the husband, and he may dispose of it by deed or will, subject to the interests of his widow or children." Again, "when the eldest son attains twenty-one, he and his father together can unfetter the estate and re-settle it as they please, subject only to the jointure and portions (c). And after the father's death, the son may do it by himself; nor can the father defeat his son's power of alienation (d). Where a son attains twenty-one in his father's lifetime, the father frequently grants the son a provision during their joint lives, in consideration of which the son joins with his father in re-settling the estate, in such a manner that, if he dies without issue, the estate may go over to the younger branches of the family" (e). Further on (f) Lord St. Leonards remarks, "The desire of continuing an estate in the male branch sometimes induces the parent to give the estate, in the first instance, to the issue male of his sons, with remainder to his daughters, not altogether, but successively, and to their issue male only. And in that case no provision is made for the female issue of his sons and daughters unless there is a failure of issue male. This mode of a settlement a lawyer would shortly describe thus:—To the first and other sons successively in tail male, remainder to the first and other daughters successively in tail male. Remainder to the first and other sons successively in tail general, remainder to the first and other daughters successively in tail general. The mischief of this plan," Lord St. Leonards continues, "is, that the estate may go backwards and forwards from one branch of the family to the other. Thus, if you have an only son and he dies and leaves a daughter, but no son, the estate will go over to your eldest daughter; but if she dies and leaves no son,

(c) See Lectures on the Seisin of the Freehold, pp. 181 *et seq.*; *ante*, pp. 213, 214.

(d) See *ante*, p. 226.

(e) See *ante*, p. 215.

(f) Page 139.

although she leaves daughters, the estate will belong to the daughter of the eldest son." "It is not unusual," he continues, "to give the estate merely to the issue male of the marriage, and then to direct it to revert to the father, subject to the widow's jointure and the daughters' portions; but where this plan is adopted, additional portions are mostly provided for the daughters in case there is a failure of issue male (*g*). On the other hand an estate is sometimes given amongst all the children, as well sons as daughters, and their issue generally, in which case no money is directed to be raised for the portions of younger children."

Future marriage.

"In making a marriage settlement," Lord St. Leonards continues, "a man should always look at a future marriage. His wife may die young leaving an infant family, and he may have no power of jointure for any other wife, or to provide portions for the children of any other marriage." In order to provide against this contingency, it is usual in settlements, not only to insert the provisions which I have attempted to explain (*h*), for securing a jointure to the intended wife, and portions for the daughters and younger sons of the intended marriage, but also to give to the husband a power to jointure a future wife, and to limit the premises to the use of trustees for a term of years, upon the usual trusts for securing such jointure, and also a power to charge the settled premises with portions of a limited amount, for the benefit of the daughters and younger sons of any future marriage, and to limit a term to trustees, upon the usual trusts for the purposes of securing such portions. To these powers I do not think that any more particular attention would be desirable in the present course of Lectures, which, from their nature, cannot

Power to jointure future wife.

Power to charge portions.

(*g*) See *ante*, pp. 265 *et seq.*

(*h*) *Ante*, pp. 216, 217, 259 *et seq.*

possibly include all that may be said on the subject of settlements.

I now come to the consideration of what are usually called shifting clauses, viz., clauses in the settlement by which, on certain given events, the estates of the beneficiaries are to shift away from them and to vest in other persons. One of the most usual shifting clauses is what is commonly called *the name and arms clause*; by which all persons, becoming beneficially entitled under the settlement, are directed to take and use the name and arms of the settlor, on penalty of forfeiting their estates. I may remind you that, at common law, before the passing of the Statute of Uses (*i*), it was impossible to make any provision of this kind. The only means by which, at common law, an estate could be determined, was by a condition; and nobody could take advantage of a condition at common law but the grantor or his heirs (*k*). The grantor of lands could not provide that, on any given event, the lands he granted should be forfeited by the grantee *and belong to somebody else*. He might provide that, on a given event, they should be forfeited by the grantee: but in that case nobody but himself or his heirs was allowed to take advantage of the forfeiture. But that which could not be effected directly at the common law, was allowed in equity to be effected by the means of a use or trust; so that a feoffment could be made of land to feoffees and their heirs to the use of or in trust for A. B. until a certain event, and, after the happening of that event, then to the use of or in trust for C. D. and his heirs. The Statute of Uses turned all uses and trusts of this nature into legal estates; and the consequence was, that if a feoffment or other conveyance were made to the use of A. B. until a certain event

Shifting clauses.

Name and arms clause.

Common law allowed a condition only.

(i) Stat. 27 Hen. 8, c. 10.

(k) *Ante*, p. 21.

should happen, and, after the happening of that event, to the use of C. D., A. B. had a legal estate in the lands determinable on the happening of the event; and, on the happening of the event, the legal estate in the lands shifted away from A. B. and vested in C. D.; and so shifting uses were allowed to take effect. And the inconvenience which might arise from the destination of estates in this manner for too long a period, was restrained by the rule of perpetuities, which was gradually settled by a series of decisions, restraining all shifting uses to the period I have so often mentioned of a life or lives in being and twenty-one years afterwards, with the addition of the period of gestation, should a child be living, though not born (*l*).

Form of
name and
arms clause.

Now the usual form of the name and arms clause is as follows. The form I have taken will be found in the third volume of Davidson's *Precedents in Conveyancing* (*m*). "Provided always and it is hereby agreed and declared that every person who, under these presents, shall become entitled as tenant for life, or as tenant in tail male or in tail, to the actual possession or to the receipt of the rents and profits of the said premises hereinbefore expressed to be hereby appointed and granted, and who shall not then use and bear the surname and arms of B. shall, within one year after he or she shall so become entitled, or, being an infant, within one year after he or she shall attain the age of twenty-one years, and also that every person whom any female so becoming entitled shall marry, shall within one year after such female shall so become entitled or shall marry, whichever of such events shall last happen (unless in the said respective cases any such person shall be prevented by death), take upon himself or herself and use in all deeds and writings

(*l*) *Ante*, pp. 29, 31.

(*m*) Page 1020, 3rd ed.

which he or she shall sign, and upon all occasions, the surname of B., together with his or her own family surname, and quarter the arms of B. with his or her own family arms, and shall within the said one year (unless prevented by death) apply for and endeavour to obtain a proper licence from the Crown, or take such other steps as may be requisite, to authorize him or her so to take, use and bear the said surname and arms of B. And further that in case any such person shall refuse or neglect, within the said one year, to take, use and bear such surname and arms, or to take such steps as aforesaid, or shall at any time afterwards discontinue to use and bear such surname or arms, then and in every such case, immediately after the expiration of the said one year, or immediately after such discontinuance as aforesaid, as the case may be, if the person who or whose husband shall so for the time being refuse, neglect or discontinue as aforesaid, shall be (either by himself, or herself, or together with her husband) *tenant for life*, the limitation hereinbefore contained to the use of such person, and his or her assigns, during his or her life, shall absolutely determine and become void; and if the person who or whose husband shall so for the time being refuse, neglect or discontinue as aforesaid, shall be tenant *in tail male or in tail*, then the limitation under which such person shall be tenant in tail male or in tail shall absolutely determine, and in the said respective cases the said premises hereinbefore expressed to be hereby appointed and granted shall immediately go to the person or persons next in remainder under the limitations herein contained, in the same manner as if such person, being tenant for life, were dead, or, being tenant in tail male or in tail, were dead, and there were a general failure of issue inheritable under such limitations in tail male or in tail respectively. Provided always and it is hereby agreed and declared that the determination

nder the proviso lastly hereinbefore contained of the estate hereinbefore limited to any person who or whose husband shall so for the time being refuse, neglect or discontinue as aforesaid, and who shall be tenant for life, shall not prejudice or affect any of the contingent remainders hereinbefore limited to his or her son or sons, daughter or daughters, or any other person ; and that from and after such determination as aforesaid, the said premises hereinbefore expressed to be hereby appointed and granted, shall remain and be to the use of the said [trustees], their heirs and assigns, during the life of the person who or whose husband shall so for the time being refuse, neglect or discontinue as aforesaid ; and the said [trustees], their heirs and assigns, shall thenceforth, during the life of such person, pay the rents and profits of the said premises to, or permit the same to be received by, the person or persons for the time being entitled under the limitations hereinbefore contained to the first vested estate in remainder expectant on the death of such person as aforesaid."

You will observe that, under this clause, every person who is made tenant for life of the settled premises is required to take the name and arms of the settlor within one year after he shall become entitled in possession, and in case he neglects or refuses to do so, then his life estate will absolutely cease, and the person next in remainder under the settlement will be entitled to the property as if he were dead. There is no escaping from such a provision as this in the case of a tenant for life ; and accordingly within a year the tenant for life will be bound to comply with the provisions. Sometimes females are made tenants for life, the property being limited to trustees upon trust for their separate use. Their case is met by that part of the clause which provides, that the persons *entitled to the actual receipt of*

Tenant for
life must
comply.

Females
tenants for
life.

the rents shall take the name and arms. And the event of any female being a married woman is also provided for by that part of the clause, which declares that every person whom any female becoming entitled shall marry, shall, within one year after she shall become entitled or marry, which may last happen, take the name and arms. If the tenant for life should have no child at the time of the cesser of his life estate, and if, subject to his life estate, the lands are settled to the use of his first and other sons successively in tail male or in tail, then the cesser of his life estate would cause the contingent remainders to his first and other sons in tail to fail, for want of a particular estate of freehold to support them. This would happen under the rule of law (which I endeavoured to explain in former Lectures) which requires a continuous seisin of the freehold to be kept up in every settlement by way of life estate and remainder (n). In order to provide for this, the clause is inserted which directs that, after the determination of the life estate under the proviso, the premises shall remain to the use of trustees, their heirs and assigns, during the life of such tenant for life. This provides an estate of freehold, by which the contingent remainders to the sons of the tenant for life, who has forfeited his life estate, are preserved. The trusts of the estate so given to the trustees during the remainder of the life of the person whose life estate is forfeited, are, as we have observed, to pay the rents to the persons entitled to the first vested estate in remainder expectant on the decease of such tenant for life.

Husband to take name and arms.

Limitation to trustees during life of tenant for life.

Trust for next remainderman.

With regard to a tenant in tail, such as the eldest son of the tenant for life, it is impossible to frame any clause which shall be absolutely binding after he has

Tenant in tail.

(n) Lectures on the Seisin of the Freehold, pp. 189 *et seq.*, and Appendix (B.), p. 205. The Act to amend the law as to contingent remainders (stat. 40 & 41 Vict. c. 33) had not passed when this Lecture was delivered.

When no
time limited.

A convenient
time.

Tenant in
tail may
escape the
condition.

come of age. Of course some time must be allowed to him to take the name and arms; and one year is the time usually provided. In some cases no express time is mentioned, but this is by no means desirable. The question then arises within what time he is bound to comply with the condition. The answer of the law to a question of this sort, when no time is limited, usually is that it must be done within *a convenient time*; and what that convenient time is, is a very uncertain matter; and in a case of this kind has never been clearly defined. Suppose, however, that the time allowed is one year, the tenant in tail, if not disposed to take and bear the surname and arms, has nothing to do but to execute a disentailing deed within the year. By that means he cuts out not only every estate in remainder after his estate tail, but also every estate to take effect in defeasance of his estate tail (c). He turns his estate tail into an estate in fee simple, and there is then no one to take advantage of the condition imposed by the settlor that he should take and bear the name and arms. By this means the whole clause is defeated; and I know of no way, in which a direction of this kind can be so fastened on an estate tail, as that it cannot be defeated by a disentailing deed, executed by the tenant in tail, and enrolled within due time in the Chancery Division of the High Court. If, however, the tenant in tail should allow the year to elapse without complying with the condition and without having executed a disentailing deed, then his estate tail will be forfeited for the benefit of the person next in remainder. You will observe the terms in which the clause of forfeiture is couched. It is said that, on his neglect or refusal within a year to take and bear the surname and arms, the limitations, under which he shall be tenant in tail male or in tail, shall absolutely determine, and the premises shall go to the person next in remainder under the limitations, as

(c) Lectures on the Seisin of the Freehold, p. 161.

if such tenant in tail male or in tail were dead, and there was a general failure of issue, inheritable under such limitations in tail male or in tail respectively.

In the case of a tenant in tail, it is not accurate to say that the premises shall go over as if such tenant in tail were dead; for an estate in tail does not cease by the death of the tenant in tail, in case he dies leaving any issue inheritable under the estate tail. But the lands descend on his issue, first on his eldest son and his issue, and so on according to the rules of descent. So that, to say that the estate tail shall cease as if he were dead, is to say that it shall cease as if an event had happened on which it would not cease. And it has been held that an estate tail cannot be partially determined. It must either be determined altogether or not at all. A remarkable instance of this doctrine occurred in the case of *Seymour v. Vernon*, decided by Vice-Chancellor Kindersley (*p*). The marginal note is as follows:—"An estate tail cannot be so limited as to defeat part thereof, and leave part thereof not defeated. Therefore, where a testator by his will devised real estate to trustees, upon trust to convey, settle, and assure the same to the use of H. for life, with remainder to his first and other sons in tail male, with remainders over, and provided that if H. or any of his children or remoter issue, who might be entitled thereto, should, while entitled to the actual possession thereof, reside in foreign parts for more than six months at a time, or should not, upon or within six months after succeeding thereto, profess the Protestant religion, the devises and bequests in favour of H. and his sons and remoter issue should be void, *so far as concerned the rights and interests of the party making default, and not further*; it was held that the clause of forfeiture was void, and that the

Estate tail does not cease by death of tenant in tail leaving issue.

An estate tail cannot be partially determined.

Seymour v. Vernon.

tenant in tail, who did not comply with the conditions, but executed a disentailing deed the day after he attained his majority, was absolutely entitled."

Name to be added after, not before, the tenant's own surname.

With regard to taking a testator's surname under a name and arms clause, it has been held that adding the testator's surname before that of the devisee was not a sufficient compliance by the devisee with a direction in the will that he should take the surname of the testator; but that adding the testator's surname after his own surname was a sufficient compliance with the direction that he should take and use the surname of the testator. This was decided by the present Master of the Rolls in

D'Eyncourt v. Gregory. *D'Eyncourt v. Gregory (q).*

Next remainderman must comply with condition.

If the direction to take the name and arms should not be complied with within the time prescribed, and the estate should consequently go over to the next in remainder under the shifting clause, the next remainderman will of course take, subject to the condition, which applies usually to all that take under the settlement, that he on becoming entitled should take the name and bear the arms of the settlor. And if, the condition having been broken by the previous tenant for life or in tail, the next remainderman should, from ignorance of the event having happened, or from good nature and a wish not to disturb his possession, allow him still to remain in possession of the property, he the remainderman will nevertheless be bound to take the name and bear the arms within the twelve months, or other prescribed time, after he has become entitled to the property. And if he should neglect to do so, he will himself forfeit the estate for the benefit of the next in remainder after him, to whom it will shift by virtue of the shifting clause. A double shifting of the estates in this manner

occurred in the recent case of *Astley v. Earl of Essex* (r). *Astley v. Earl of Essex.*
 In that case an estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume the testator's name and arms of Thompson. And it was provided that, in case any such person should fail or neglect so to do, for twelve calendar months after he should become so entitled in possession, his estate and interest should cease; and the estate should go to the person who should be next in remainder and then *in esse*, as if the person so failing or neglecting were then dead. The Master of the Rolls came to the conclusion that the shifting clause applied to tenants in tail, notwithstanding the inaccuracy of the gift over, which, with regard to tenants in tail, should have expressed that their estate should cease as if they had been dead without issue inheritable under the entail (s). He then held that the first tenant in tail had forfeited his estate by non-compliance with the name and arms clause, and that the next remainderman might have entered, either immediately or after the death of the prior tenant in tail without issue, which occurred in the year 1868. The next tenant in tail was ignorant of the will and of the condition; and consequently never took the name and arms. And it was held that this ignorance was no excuse, and that he consequently lost the estate. The following distinction occurs on this point:—If a testator leaves an estate to his heir at law on condition, the heir at law, having a title to enter independently of the will, cannot be deprived of the estate for non-performance of the condition, unless he has had notice thereof. But a person who is not heir at law can only take a benefit under a will by complying with the terms of it, whether

Heir at law entitled to notice of a condition.

Devisees not.

(r) L. R., 18 Eq. 290.

(s) *Ante* p. 297.

he has notice of those terms or not. I apprehend that the same principle applies to a settlement.

*Egerton v.
Earl Brown-
low.*

Shifting
clause on
death, with-
out having
acquired a
title, void.

Other shifting clauses are those which arise on an accession to a title or on the accession of other estates. And here I may notice the celebrated case of *Egerton v. Earl Brownlow* (t). That was the case of a shifting clause, not on the accession of a title, but on the devisee dying without having acquired a title. And it was held by the House of Lords that such a shifting clause was void, as being against public policy. The Earl of Bridgewater devised large estates to trustees to make a settlement according to the limitations mentioned in his will. One of the limitations was to Lord Alford for ninety-nine years if he should so long live, with remainder to trustees during his life to preserve contingent remainders, with remainder to the use of the heirs male of his body, with divers remainders over. The testator then provided that, if Lord Alford should die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate thereinbefore directed to be limited to the heirs male of his body should cease and be absolutely void. The court held that, the condition being void as against public policy, the eldest son of Lord Alford was entitled to the estates as heir male under the limitation, although Lord Alford had not acquired the coveted title.

Accession of a
title.

*Cope v. Earl
De la Warr.*

An example of estates shifting away upon the accession of a title occurred in the case of *Cope v. Earl De la Warr*, decided by Vice-Chancellor Bacon, and affirmed on appeal by the Lords Justices (u). By letters patent the barony of Buckhurst was conferred on Elizabeth,

(t) 4 H. of L. Cas. 1.

(u) L. R., 8 Ch. 982.

then the wife of George John, Earl De la Warr, for her life, with successive remainders to her second and other sons, and the heirs male of their respective bodies. The patent contained a proviso, that if the second son of Elizabeth, Countess De la Warr, or any other person taking under the letters patent, should succeed to the earldom of De la Warr, the succession to the dignity of Buckhurst should devolve upon the son of Elizabeth, Countess De la Warr, or the heir who should be next entitled to succeed to the barony of Buckhurst, if the person so succeeding to the earldom of De la Warr was dead without issue male. In 1864, Mary, Dowager Countess Amherst, elder sister of Elizabeth, Countess De la Warr, by a codicil to her will, gave the mansion and park of Knole, in Kent, to trustees, upon trust to convey, settle and assure the same in a course of entail, to correspond as nearly as might be with the limitations of the barony of Buckhurst, and the provisos affecting the same contained in the letters patent. A settlement was executed accordingly, which provided, that if the second son of Elizabeth, Countess De la Warr, who had then by her death become Baron Buckhurst, or any other person taking under the limitations therein contained, should succeed to the earldom of De la Warr, the succession to the lands thereby settled should devolve upon the son of Elizabeth, Countess De la Warr, or the heir who would be next entitled to succeed to the barony of Buckhurst, if the person so succeeding to the earldom of De la Warr was dead without issue. The second son of Elizabeth, Countess De la Warr, afterwards succeeded to the earldom of De la Warr. He had issue male. And it was held that, upon the second son of Elizabeth, Countess De la Warr, succeeding to the earldom of De la Warr, the third son of Elizabeth, Countess De la Warr, became entitled in possession to the settled estates. It has since been held by the

House of Lords, that the letters patent by which the barony of Buckhurst was conferred were void so far as regards the shifting clause of the title of Buckhurst on accession to the title of De la Warr (*x*). But there is no doubt that any person may lawfully settle estates to shift away from any one of the beneficiaries on his accession to a title.

Shifting on
accession of
other estates.

*Harrison v.
Round.*

Other shifting clauses arise on the accession of other estates. Nice questions sometimes arise as to the wording of such clauses, and as to whether the event marked out in the settlement, on which the settled estates are to shift away, has or has not actually occurred. I may mention two cases which show the doctrine of the court on this head. The first is *Harrison v. Round* (*y*), in which it was held that the event had occurred, and that the estate accordingly shifted away. In that case it was provided that if the second son, on whom the estate was settled, should become an eldest son, and as such should become entitled to the actual possession or to the receipt of the rents and profits of another estate, the limitations of the settled estate should cease and determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son, and joined with his father in suffering a recovery of the other estate, to such uses as the father and son should jointly appoint, and subject thereto to the old uses. The father and son in exercise of this power raised a sum of money by a mortgage in fee of the same estate, which money was paid to the father and son. It was held that neither the recovery suffered by the father and son, nor the mortgage made by them, prevented the second son from becoming on the death of his father entitled, as eldest son, to the actual possession of the settled estate within the meaning

(*x*) L. R., 2 App. Cas. 1.

(*y*) 2 De Gex, M. & G. 190.

of the proviso; and that accordingly the estate settled on him shifted away to the next in remainder. In contrast with this case stands that of *Meyrick v. Laure* (z). *Meyrick v. Laure.* In this case there was a similar shifting clause, the estate being settled on the second son and his issue male, with a shifting clause on such son or his issue male becoming entitled in possession to estates in Shropshire settled on the marriage of the father of such second son. The father and his eldest son disentailed the Shropshire estates, and limited a portion of them to the father in fee; and resettled the remainder of the Shropshire estates in such a way that the second son became ultimately tenant for life thereof, subject to charges which had been created thereon by his father and elder brother. It was held that, inasmuch as the second son acquired an interest in the Shropshire estates under what was substantially a new title, and the estates were moreover diminished in quantity, the shifting clause did not take effect.

(z) L. R., 9 Ch. 237.

LECTURE XXI.

Powers of leasing.
Act to facilitate leases and sales of settled estates.

Tenant for life, &c. may grant leases for twenty-one years.

I now come to consider the subject of powers of leasing possessed by tenants for life. Prior to the passing of the Act to facilitate leases and sales of settled estates (*a*), a tenant for life had no power to grant a lease of the lands of which he was tenant for life, so as to bind those in remainder, unless the settlement under which he claimed were made by way of use under the Statute of Uses (*b*), or by will, and an express power to grant leases were conferred upon him by such settlement. But this Act, which came in force on the 1st of November, 1856 (*c*), empowers every tenant for life under a settlement made after the Act came in force, to lease for twenty-one years without fine at the best rent (*d*). This Act was amended and extended by several other Acts (*e*); and the whole of the Acts have now been repealed, amended, and consolidated into one Act, called the Settled Estates Act, 1877 (*f*). This Act commenced on the 1st of November, 1877 (*g*). It enacts (*h*) that it shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall con-

(*a*) Stat. 19 & 20 Vict. c. 120.

(*b*) Stat. 27 Hen. 8, c. 10; *ante*, pp. 36, 37.

(*c*) Sect. 46.

(*d*) Sect. 32.

(*e*) Stats. 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; and 39 & 40 Vict. c. 30.

(*f*) Stat. 40 & 41 Vict. c. 18.

This Act was not passed when this Lecture was delivered, but I have thought it better to incorporate it in the text.

(*g*) Sect. 61.

(*h*) Sect. 46.

tain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee (i), without any application to the court, to demise the same or any part thereof, except the principal mansion-house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at, or within one year next after, the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every lease be executed by the lessee. This enactment differs from that contained in the Act to facilitate leases and sales of settled estates in extending the term to thirty-five years for estates in Ireland, in not requiring the lease to take effect in possession, in requiring the condition of re-entry to be on non-payment of rent for twenty-eight days or some less period, instead of "for a period not less than twenty-eight days," and in omitting to require a condition for re-entry "on non-observance of any of the covenants or conditions" contained in the lease.

Difference
between the
two enact-
ments.

(i) See *ante*, p. 111.

Against
whom such
leases shall
be valid.

Evidence of
execution of
counterpart
by lessee.

Tenants for
life, &c. to be
deemed en-
titled not-
withstanding
incum-
brances.

Saving rights
of lords of
manors.

Every demise authorized by the Settled Estates Act, 1877, is valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled (*k*). The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by the Act (*l*). And for the purposes of the Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered, either by himself or by the settlor, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein (*m*). Nothing in the Act is to authorize the granting of a lease of any copyhold or customary hereditaments, not warranted by the custom of the manor, without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor (*n*). The above provisions extend only to settlements made after the 1st of November, 1856 (*o*), the time when the Act to facilitate leases and sales of settled estates came in force. In a recent case, where the legal estate was vested in trustees in trust, after paying certain charges, to hold the surplus of the rents and profits for the separate use of a married woman during her life, it was held by the present Master of the Rolls that she had no power to grant a lease by virtue of the 32nd section of the Act for leases and sales of settled estates, which in this respect is similarly worded to the 46th section of the present Act. The

(*k*) Stat. 40 & 41 Vict. c. 18,
s. 47.

(*l*) Sect. 48.

(*m*) Sect. 54.

(*n*) Sect. 56.

(*o*) Sect. 57.

name of this case is *Taylor v. Taylor* (*p*). This case was affirmed on appeal (*q*). But, in affirming this decision, the Lord Justice James remarked that he should have required more time to consider the Act of Parliament if he thought that the decision of the Master of the Rolls could be construed as a decision that a tenant for life, who is to receive the rents and profits during her life through the hands of a trustee, was not the tenant for life within the meaning of the Acts; but he took the decision of the Master of the Rolls to be based on the very peculiar provisions of the will.

If it be wished to enable the tenant for life to grant leases on different terms from those above mentioned, or if the property is suitable for granting building or mining leases, powers of leasing for these purposes ought to be contained in the settlement. Powers of leasing, like all other powers contained in settlements, take effect by virtue of the Statute of Uses. A power of leasing cannot be inserted in any settlement that is not made under that statute; although it may be inserted in a will by way of executory devise. The operation of a power of leasing is, so far as it goes, of the same nature as a shifting clause, of which I spoke in the last Lecture (*r*). The use is, by the power of leasing, appointed to the lessee for the term of years mentioned in the lease. The lessee takes as if he had been named in the settlement as the person to hold the land for the term appointed (*s*). And with regard to the rent and covenants, the effect is the same as if the lease had been granted the day before the settlement by the settlor, when he was seised in fee, and he had made the settlement immediately afterwards. The rent is carried to each person successively entitled under the settlement, in the same way as it would have been if

Operation of
power of
leasing.

(*p*) L. R., 20 Eq. 297.

(*r*) *Ante*, p. 291.

(*q*) L. R., 3 Ch. D. 145.

(*s*) *Ante*, pp. 36, 37.

the settlor had first granted the lease, and then settled the land subject to the lease.

Form of
power of
leasing.

The following is a specimen of an ordinary power of leasing contained in a settlement: "Provided always, and it is hereby agreed and declared, that it shall be lawful for the said A. B. during his life, and after his decease for the said A. B. junior during his life, and after his decease for the said [trustees] or the survivor of them, and the executors and administrators of such survivor, during the minority of any son of the said A. B. junior who, if of full age, would be entitled to the possession or receipt of the rents and profits of the premises hereby settled, by deed to demise or lease all or any part of the said premises for any term of years not exceeding twenty-one years, to take effect in possession, so that there be reserved in every such lease the best yearly rent that can be reasonably gotten for the same, without any fine or premium for the making thereof, and so as there be contained in every such lease a condition of re-entry for non-payment of the rent thereby reserved, and so as the lessee or lessees do execute a counterpart thereof, and do thereby covenant for the payment of the rent or rents thereby to be reserved, and be not made punishable for waste." In some forms the power is expressed to be *to appoint* by way of lease; and this no doubt accurately expresses the operation of the lease. When granted it is an appointment of a use under the Statute of Uses. There is, however, no occasion so to express the power, as a power to lease is and must be in law a power to appoint the use of the premises.

Appointing
by way of
lease.

To lease in
possession.

If the power is, according to the form I have just mentioned, to lease *in possession*, no lease can be made to take effect after its date. The lease must be either from the day of the date, or from some previous day. And

in order to avoid mistakes in this respect, which not unfrequently occur, it is now not unusual to authorize the lease to be granted, under powers of this nature, either in possession or within a short time, say one year, as in the Settled Estates Act, 1877 (*t*), after the date of the lease. The best yearly rent that can be reasonably gotten speaks for itself. The lessor is not bound to take the highest offer; but he may consider the character and responsibility of the tenant. He must not, however, take anything for himself in the way of a fine or premium. There must be a fair reservation of the best yearly rent; and that yearly rent must be payable every year until the expiration of the lease. So that, should the tenant for life die during the lease, the remainderman may have his full and fair share of the rent reserved.

Best yearly
rent.

No premium
to be taken.

Powers not unfrequently require that the lessee shall not be made punishable for waste, or exempted from punishment for committing waste. And we have just seen (*u*) that the leases which a tenant for life is authorized to make under the Settled Estates Act, are not to be made without impeachment of waste. On this point a nice question sometimes arises. It was doubted whether, if the lessor took upon himself the onus of repairing the premises, the lease was within a power of leasing, which provided that the lease should not contain any clause whereby any power or authority should be given to any lessee to commit waste. And it was decided that a lease of this sort was a sufficient compliance with the power. That is the case of *Doe d. Bromley v. Bettison* (*v*). On the other hand, the Court of Exchequer, in the case of *Yellowley v. Gower* (*x*), held that a lease was void, as not being in pursuance of the power, under

Where lessee
not to be
made dis-
punishable
for waste.

Where lessor
agrees to re-
pair.

*Doe d. Brom-
ley v. Bettison.*

*Yellowley v.
Gower.*

(*t*) Stat. 40 & 41 Vict. c. 18; (*v*) 12 East, 305.
ante, p. 305. (*x*) 11 Ex. 274.

(*u*) *Ante*, p. 305.

the following circumstances. The settlement contained a power for the tenant for life to demise the premises for any term not exceeding twenty-one years, at the best rent, so that the lessee was not by any clause or words therein to be contained made *dispunishable for waste*, or exempted from punishment for committing waste. The tenant for life by deed leased the premises to the defendant for twelve years. The lease contained a covenant by the lessee to repair part of the premises; but there was also a covenant by the landlord that he would repair all the rest of the premises, except in respect of the repairs thereinbefore covenanted to be done by the defendant. The court drew a somewhat refined distinction between this case and that of *Doe v. Bettison*, which I have just mentioned. They held that in the present case there was an implied exemption from punishment for permissive waste, and that it differed from the case of *Doe v. Bettison*, on which the defendant's counsel relied. That case, they remarked, was decided expressly on the ground that the deed creating the power stipulated against any clause in the lease whereby power should be given to *commit waste*, or exempting him from punishment for committing it. The lease, therefore, which allowed any permissive waste, in the opinion of the court was not void on that account. They thought that in the present case the donee was meant to be prevented from making a lease, which should contain terms expressly or by implication exempting the lessee from punishment for permissive or voluntary waste. In consequence of this decision some conveyancers, rather than run the chance of raising questions of this kind, have omitted in their powers of leasing any restriction with regard to the commission of waste by the lessee.

With regard to the terms in which the rent should be reserved, in the case of a lease granted by a tenant

for life in pursuance of a power of leasing, it is better to say generally, "yielding and paying so much rent yearly and every year;" without saying to whom the rent is to be paid. And the law will then make the rent payable to the person properly entitled to receive it. If it is endeavoured to state the persons to whom the rent is to be paid, this should be done accurately; and the reservation should be made to the person or persons for the time being entitled to the said premises in reversion immediately expectant on the determination of the term of years granted by the lease. If, however, the tenant for life should, by mistake, reserve the rent to himself, his heirs and assigns, this will not invalidate the lease. This was decided in an old case called *Whitlock's case* (y). "It was objected," says the Report (z), "that the said reservation was such that it was not payable during the said lease, as it ought, but only during the life of the lessor; and he, having but an estate for life, reserved the rent to him and his heirs; and his heirs cannot have it." But it was resolved that the reservation was good; for the said lease "hath not its essence from the estate of the lessor which he hath for life; but the lease, in construction of law, precedes the estate for life and all the remainders; for, after the lease made, it is as much as if the use had been limited originally to the lessee for the said term, and then the other limitations in construction of law follow it. Then, when the lessor reserved rent to him and his heirs, it is good, for that by construction of law precedes the limitation of the uses; and then, it being well reserved, it is well transferred to every one to whom any use is limited. So, if the reservation be to the lessor and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good; for the law will distribute to every one to whom any limi-

General
reservation of
rent.

*Whitlock's
case.*

(y) 8 Rep. 69.

(z) Page 70.

*Yellowley v.
Gower.*

tation of the use shall be made. And in such case no rent is reserved to a stranger; for the reservation precedes the limitation of the uses to strangers. But it was agreed that the most clear and sure way was to reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person." However, in the case of *Yellowley v. Gower* (a), to which I have before referred (b), the court held that it made a difference that there was a term of five hundred years in the premises preceding the life estate of the tenant for life, and that, where that was the case, if the tenant for life in pursuance of the power reserved the rent to himself, his heirs and assigns, the lease was void. For, it was said, the term under the power took effect prior to the term of five hundred years; and the moment the lease was made, the reversioners to receive the rent were in law strictly speaking the trustees, in whom the term of five hundred years was vested. So that neither the lessor himself nor his heirs or assigns were, so long as the five hundred years lasted, the reversioner to receive the rent. The grant of a lease by the tenant for life under such circumstances, without saying to whom the rent was to be reserved, would, it was admitted, have carried the rent to the trustees of the five hundred years term; and so would a limitation reserving the rent to the person or persons for the time being entitled to the reversion expectant on the determination of the term.

Lord St.
Leonards'
remarks on
*Yellowley v.
Gower.*

On this decision Lord St. Leonards, in his Treatise on Powers (c), makes the following remarks, in which I venture to say I heartily concur: "This is, indeed, a narrow construction. Some weight appears to have been given to the circumstance that there was a term of years prior to the life estate; but this presented no real diffi-

(a) 11 Ex. 274.

(b) *Ante*, p. 309.

(c) Page 814, 8th ed.

culty, for both by operation of law and by the terms of the power, requiring the lease by the tenant for life in remainder to take effect in possession, the lease would override the term. But after the lease the tenant for life would have no greater right to the rent as against the trustees of the term, than before the lease he had to the possession and the profits of the estate. A reservation of the rent to the lessor, his heirs and assigns, is by law free from objection, for the rent was made payable during the term, and the other words might have been rejected as surplusage; or, without rejecting the words, they might and ought, according to the doctrine in *Whitlock's case*, to have been held to be a good reservation, and to be well transferable to every one to whom any use is limited. This doctrine particularly applies, if we are to be bound by technicalities in a case like this, where all the uses were served out of a seisin created by the settlor, the tenant for life under the settlement. Now it was admitted that the reservation would have been good if the power had been recited. But in order that a lease should operate as an execution of a power, it is not necessary to refer to the power where the lease cannot have all the effect intended, as in this case where the lease would cease on the death of the tenant for life within the term, if made by force of his interest; therefore, as we have seen, the lease should be held to operate under the power, although there appears no such intention of the parties. This is settled law, as we have seen. Here the intention is clearly shown; for notwithstanding the prior term of five hundred years, and the limitations subsequent to his life estate, the tenant for life made the lease for an absolute term in possession, and reserved the rent to his heirs and assigns, that is, to those claiming the estate under him, whether prior to him or after him. The power followed the rule of law, for it authorized a lease, either referring or not referring to the power. The objection that the

lessee did not know to whom the rent was to be paid, inasmuch as the power was not recited, does not seem entitled to much weight. It would to some extent prevail in every case where the lessee was not furnished with a copy of the settlement, and it could lead to no practical difficulty, for no person could claim the rent without showing his title under the settlement. But this is a weak ground; for, while it seems to protect the lessee, it really takes from him the benefit which the settled rule of law gives him in such a case, viz., a valid lease for the whole term according to the terms of the lease."

Building leases.	In addition to powers to grant ordinary leases for twenty-one years, if the settled estate is likely to become available for building, powers should be inserted for granting building leases. And in such cases it is much better to give also a power to enter into preliminary contracts with builders for the granting of building leases; so that the lease may not be actually granted until the houses to be erected shall have been roofed in, or have arrived at some other stage towards their actual completion. In mining countries it is also very desirable to give powers for granting mining leases. Such powers should authorize the grant not only of such powers of entry and working as may be necessary to win the minerals demised (<i>d</i>), but also powers of instroke and outstroke, or of carrying coals or other minerals into and out of the mines demised, if such powers be desired, together with powers to erect workmen's cottages, if such be intended (<i>e</i>). The powers to be granted cannot be too plainly defined. Where building or mining leases are granted, it is obvious there must be the commission of waste in some cases, such as the pulling down of old buildings, and
Preliminary contracts.	
Mining leases.	
Instroke and outstroke.	
Workmen's cottages.	
Waste.	

(*d*) See *Earl of Cardigan v. Armitage*, 2 B. & C. 197, 211.

(*e*) *Morris v. Rhydyfedd Colliery Co.*, 3 H. & N. 885.

the opening of new mines. In such leases, therefore, care should be taken not to insert a clause providing that the lessee shall not be punishable for waste.

As I observed in a previous Lecture (*f*), when manors are settled, it is also desirable to grant powers for granting licences to copyholders of the manor for leasing their tenements. For leases of copyholds made by the licence of the lord take effect out of the estate of the lord, and not, like grants of copyholds, by virtue of the custom of the manor. A tenant for life of the manor can therefore, in the absence of any express power reserved to him by the settlement, give licence to a copyholder to lease his tenements only for a term which must cease on the death of the licensor.

Licence to
copyholders
to lease.

A power in a settlement to grant leases is a power to shift the use on a certain given event; and if the event does not happen, the use does not shift. The consequence of this doctrine was, that, in many cases, great hardship arose from leases being made by tenants for life, which varied in some insignificant points from the powers under which the leases were purported to be granted. And the consequence was, that, on the death of the tenant for life, the lessees were liable to be evicted by the next remainderman. In some cases the whole of the tenants on large estates were turned out by the remainderman on his coming into possession, in consequence of their leases not being in strict accordance with the power of leasing contained in the settlement. And yet the settlement, generally speaking, was in the power and custody of the grantor of the leases only,—no opportunity being afforded to the tenants of ascertaining, on their own behalf, whether the power was complied with or not. In order to

Eviction of
tenants from
defects in
leases under
powers.

(*f*) Lectures on the Seisin of the Freehold, p. 41.

Relief against defects in leases under powers.

Stat. 12 & 13
Vict. c. 26,
s. 4.

remedy the evil occasioned by this state of the law, an Act was passed for granting relief against defects in leases made under powers of leasing in certain cases (*g*). One of the enactments of this Act (*h*) is valuable in the case of a lease, under a power to grant leases in possession, being inadvertently made to take effect at some period later than the date of the lease (*i*). The Act provides (sect. 4), that where a lease, granted in the *intended exercise* of any such power of leasing as aforesaid, is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him, in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid, as if the same had been granted at such last-mentioned time. So that if the tenant for life lives beyond the time at which the lease was made to commence, the lease will be valid; inasmuch as a like lease might then have been granted by him in the lawful exercise of his power.

Sect. 2.

Invalid lease under power considered in some cases as a contract for a valid lease.

The second section of the Act enacts, that where, in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament, or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the

(*g*) Stat. 12 & 13 Vict. c. 26,
amended by stat. 13 & 14 Vict.
c. 17.

(*h*) Sect. 4.
(*i*) See *ante*, p. 308.

reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been *made bonâ fide*, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require) *have entered thereunder*, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators or assigns (as the case may require) of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons, who would have been bound by a lease lawfully granted under such power, shall be bound in equity by such contract. Provided always that no lessee, under any such invalid lease as aforesaid, his heirs, executors, administrators or assigns, shall be entitled, by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation.

This is a very beneficial provision. You will observe that the lease is to be made *bonâ fide*, and that the lessee must have entered under it. And the result of the Act of Parliament is that, instead of being liable to be turned out by the remainderman, the lessee will have a right in equity to continue tenant in the same manner as if he had had a valid contract for a lease, consistent in its terms with the power which was intended to be exercised. But the Act very properly provides that if the reversioner is willing to confirm the lease without variation the clause shall not apply.

Remarks on
sect. 2.

This Act was amended by statute 13 & 14 Vict. c. 17.

Stat. 13 & 14
Vict. c. 17,
s. 3.

Where re-
mainderman
can confirm
lease, lessee
bound to
accept con-
firmation.

This Act further provides (*k*), that where, during the continuance of the possession taken under the lease, the person for the time being entitled, subject to such possession, to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly. And such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized. And after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had, from the granting thereof, the same effect as if the same had been originally valid.

Sect. 2.
Memorandum
confirming
lease.

The amending Act also provides (*l*), that where, upon or before the acceptance of rent under any such invalid lease, any receipt, memorandum or note in writing confirming such lease is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

When lease
deemed
granted in
intended
exercise of
power.

The former Act, you will observe, speaks of cases of the *intended exercise* of a power of leasing (*m*). And the fifth section of that Act (*n*) provides that, when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease, by reason of the determination of the estate or interest of such person or otherwise, cannot have effect and continuance according to the terms thereof, independent of such power,

(*k*) Sect. 3.

(*l*) Sect. 2.

(*m*) *Ante*, p. 316.

(*n*) Stat. 12 & 13 Vict. c. 26,
s. 5.

such lease shall, for the purpose of the Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease.

The Act, unfortunately, does not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital or charitable foundation (o). Exception of ecclesiastical, collegiate and charitable leases.

(o) Sect. 7.

LECTURE XXII.

Powers of
sale and ex-
change.

Power of sale
or exchange
how limited.

Request of
tenant for
life.

WE now come to the consideration of powers of sale and exchange usually inserted in settlements. These powers are very beneficial in their nature; for they enable a sale to be made of any part of the settled estates, so as to give a good title to the purchaser, and to convey to him the fee simple of the settled lands, and at the same time to keep up the settlement, by the investment of the purchase-money in the names of the trustees of the settlement, to be laid out, at a fitting opportunity, in the purchase of other lands to be settled precisely in the same manner as the lands sold were settled previously to the sale. The power, being a mere *power in gross* (a), or, as it is sometimes called, a *collateral power*, and not annexed to any estate in the trustees, is usually given to the trustees and the survivors and survivor of them, and the executors and administrators of such survivor; and it is usually required to be exercised by them at the request, or with the consent, of the tenant for life in possession of the estates; and during the minority of any tenant for life in possession, and also during the minority of any tenant in tail in possession, the power of sale is usually to be exercised by the trustees at their own discretion. The power then authorizes the trustees, at such request, or with such consent, or at such discretion as aforesaid, to dispose of, either by way of absolute sale, or in exchange for other lands, all or any part of the settled premises, sometimes excepting the family mansion and grounds. And for the purpose of such sale, or exchange, the

(a) *Ante*, p. 39.

trustees are authorized to revoke all the uses of the settlement, and to appoint such uses as may be necessary for effecting any such sale or exchange. It is then provided that all moneys which may arise from the sale, or which may be received for equality of exchange, shall be invested in the purchase of other lands, to be settled to the same uses, or such of them as shall be then subsisting or capable of taking effect. But every purchase is required to be made with the consent of the person who would have been entitled to the possession, or to the receipt of the rents and profits, of the lands to be purchased, if the same had been then actually purchased and settled. It is further provided that, until a purchase can be found in which such money may be laid out, it shall be invested, in the names of the trustees of the settlement, in the public funds, or in government or real securities, and frequently in some of the other more enlarged modes of investment which I mentioned in a previous Lecture (b); with power to alter and vary such investments from time to time as may to them seem fit. And it is provided that the income of the money so invested shall be paid to the person who would have been entitled in possession to the rents and profits of the land to be purchased if the same were then actually purchased and settled. This is the shortest and simplest form of a power of sale and exchange. If the property is incumbered, or if there are powers of charging portions or other principal sums of money on the premises, then it is usual to provide that, in case of a sale, the purchase-money shall be, in the first place, applied in the discharge of any principal sums which may then be an incumbrance on the premises, and that the residue shall be laid out in the purchase of other estates to be settled in the same manner. The lands to be purchased

Power to revoke uses of settlement and appoint new uses.

Purchase and settlement of other lands.

Consent of person entitled to possession.

Interim investment.

Income to be paid to person entitled to possession.

Discharge of incumbrances.

(b) *Ante*, p. 170.

Purchase of
leaseholds.

are usually to be either freeholds, or freeholds and copyholds convenient to be held therewith. Sometimes the power is extended to the purchase of leasehold lands held for lives or long terms of years. And in that case the provision is made—which I explained in a former Lecture (c)—where tenancies in tail are created under the settlement, that the leaseholds for years, being chattels, shall not vest absolutely in any tenant in tail male or in tail unless he shall attain the age of twenty-one years, or shall die under that age leaving issue inheritable under the entail. For you will remember that if I grant leaseholds for years to A. and the heirs or heirs male of his body, A. takes an absolute interest, which devolves, on his decease, to his executors or administrators, along with the rest of his personal estate. This clause shifts away the leaseholds from a tenant in tail, who may die in infancy without issue, and vests them in the next person entitled in remainder under the settlement.

Suspension or
extinguish-
ment of power
to request
sale.

Now with regard to the request and consent of the tenant for life to the exercise of such a power, it is, as we have seen (d), a rule of law that a person cannot defeat his own grant. And if a tenant for life should convey his life estate, either partially by way of mortgage, or absolutely by way of sale, justice requires that he should not afterwards prejudice the mortgagee or purchaser, by consenting to the exercise by the trustees of the settlement of a power of sale or exchange. And, accordingly, a mortgage or sale by the tenant for life of his life estate suspends or extinguishes the power, so far as the mortgagee or purchaser is concerned. It was indeed at one time thought—and it is so laid down by Lord St. Leonards in the last edition of his *Treatise on Powers* (e)—that a sale by the tenant for life of his life

(c) *Ante*, p. 223.

(d) *Ante*, pp. 43, 44.

(e) Sugden on Powers, pp. 70, 71, 8th ed.

estate operated as a total extinguishment of his power to request or consent to a sale of the fee simple by the trustees of the settlement. Lord St. Leonards observes: "An absolute conveyance upon a sale would, it is apprehended, prevent the power from being exercised, from the very nature of the power, independently of any technical question; for powers of sale and exchange are manifestly given to the tenant for life in consequence of the character which he fills. They are rather directed to the management of the settled estate, to its melioration, than to the disposition of the interest in it, which is only the machinery. If therefore he sells his life estate, it would be contrary to the intent of the donor that he should alter the nature of the property by a sale, or exchange the estate for another. He no longer fills the character in respect of which the powers were confided to him." However, the contrary was decided in the case of *Alexander v. Mills*, to which I have already referred (f). The law therefore now is, that the alienation by the tenant for life of his life estate, either partially or wholly, does not take away his power of requesting or consenting to the exercise by the trustees of the power of sale or exchange; provided that such power cannot be exercised to the prejudice of the alienee of the life estate, without his consent thereto.

Opinion of
Lord St.
Leonards.

*Alexander v.
Mills.*

There is one doctrine with regard to the exercise of this power, which appears to have been established rather on the strength of the practice of conveyancers, than upon any principle of law or equity. It is held that, under the ordinary power of sale and exchange, to be exercised at the request or with the consent of the tenant for life, the power may be exercised by the trustees, upon a sale to the tenant for life himself of the

Sale or exchange may be made to or with the tenant for life.

(f) *Ante*, p. 44.

*Howard v.
Ducane.*

settled estates, or upon an exchange with him of part of the settled estates for lands of his own. This was decided by Lord Eldon in the case of *Howard v. Ducane* (g). Lord Eldon observed (h), "I should have said originally that it would not do; but, whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law; and if we have got no further than this, that the antecedent practice has been doubted, I should be disposed to abide by that antecedent practice. I put this case therefore on the practice of conveyancers; and after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice." This subject came before the courts again in the recent case of *Dicconson v. Talbot* (i). In that case there was a charge against the tenant for life that he had bought the property at an undervalue, and had concealed from the trustees the value of certain mines under the property which he bought of them. But the court, affirming the decree of Vice-Chancellor Stuart, dismissed the bill of the remainderman, who claimed to set aside the sale; considering that the fraud charged had not been proved, and treating it as quite clear that, where a power of sale is given to trustees, to be exercised at the request or with the consent of the tenant for life, the trustees may sell to him as they might to anyone else.

*Dicconson v.
Talbot.*

Power to
partition.

Where an undivided share of land is comprised in a settlement, it is usual to insert a power for the trustees or the survivors or survivor of them, or the executors or administrators of such survivor, to concur with the persons entitled to the other undivided shares in the same lands, in making a partition or division of the same,

(g) *Turner & Russ.* 81.

(i) *L. R.*, 8 Ch. 32.

(h) *Page* 86.

and for that purpose, if thought desirable, to receive money for equality of partition; and sometimes also to give money for equality of partition, out of any moneys which may be in the hands of the trustees, upon trust to invest in the purchase of lands to be settled to the same uses; or occasionally to raise the money to be given for equality of partition by a mortgage of the premises to be received on partition, or by a mortgage of any other lands subject to the uses of the settlement. It has, however, been now decided that a partition may be effected by means of an ordinary power of exchange contained in a settlement in this way. The settlement has one half of the lands, and A. has the other half. The trustees may exchange their moiety in a portion of the estate with A. under their power of exchange, and they may take in exchange of A. his moiety in the other portion of the lands; and by this means the partition is completed. On this point there was a conflict of opinion; but the question is, I hope, now set at rest by a decision of the present Master of the Rolls. The case to which I refer is that of *In re Frith and Osborne* (k). In that case an undivided moiety of lands was vested in three persons as trustees of a settlement, which expressly authorized a partition; and the other moiety was vested in three other trustees, as trustees of a settlement with power to sell, dispose of, convey and assign the said hereditaments, for such a price in money, or for such an equivalent or recompense in lands and hereditaments, as to the trustees should seem reasonable; and for that purpose to revoke the old uses, and to limit other uses and trusts. A partition deed, purporting to be in exercise of the above powers, was executed by the trustees of the two moieties. And it was held by the Master of the Rolls that the partition was pro-

Partition by
means of
power of
exchange.

*In re Frith
and Osborne.*

(k) L. R., 3 Ch. D. 618.

perly effected by the latter set of trustees under their power of exchange.

As to more than two undivided shares.

This was a partition of moieties only; and the question still remains in the case of there being more than two undivided shares; as if the property is held in thirds or in fourths, or other fractions. The Master of the Rolls did not decide that question, for it was unnecessary for him to do so; but he said that, if he had to decide it, he should be inclined to decide in favour of a partition under a power of exchange contained in a settlement of any of the shares; for, if it could be done as between two, he did not see why it could not be done as between more than two.

Power to enfranchise copyholds.

With regard to the enfranchisement of copyholds, it is better, when a manor of which copyholds are held is settled, that an express power for this purpose should be contained in the settlement. The enfranchisement of a copyhold is, however, nothing more nor less than the sale of the fee simple, which belongs to the lord, to the tenant, who has only a customary right to continue as the lord's tenant at will. A power of sale, therefore, may, it is considered, be exercised by the lords of the manor, namely, the trustees with a power of sale, selling to the copyhold tenant the fee simple of the premises which he holds.

I referred in a former Lecture (1) to the case of the tenant for life being tenant for life without impeachment of waste, and to the rule in that case that, if a power of sale be exercised by the trustees of the settlement with his consent, the price of the timber must be paid to the trustees, and not to the tenant for life. I

(1) *Ante*, pp. 232, 233.

also referred to the enactment which enables the Chancery Division of the Court to give relief in cases of mistake in this matter (*m*). In analogy to the decision with regard to the sale of timber, it was decided by Lord Romilly, the late Master of the Rolls, that, under the usual power of sale in a settlement, the trustees could not sell the lands, reserving the minerals. The minerals, of course, are more beneficial to the tenant for life without impeachment of waste, than is the surface of the lands; for he may work the mines, and so greatly lessen the value of the property. On this principle it was that Lord Romilly decided the case of *Buckley v. Howell* (*n*). In that case the property was settled, by a will, on a Mr. Randolph for life, without impeachment of waste, with remainders over; and there were the usual powers of sale and exchange, to be exercised by the trustees at the request of Mr. Randolph during his life. The trustees, at his request, put up portions of the estate for sale by auction, subject to conditions of sale, under which all the minerals were reserved. The purchaser declined to complete his purchase, on the ground that the plaintiffs were not authorized, under the power of sale, to sell any of the lands and hereditaments, with an exception or reservation of the mines and minerals under the same. Whereupon the points were raised by a special case, in which the trustees were plaintiffs, and the purchaser was defendant. And the Master of the Rolls, chiefly on the authority of the case of *Cholmeley v. Paxton* (*o*), decided that the land could not be sold apart from the minerals under it. "The principle," observed the Master of the Rolls (*p*), "is this. The power must be so exercised as not to give the tenant for life more out of the property subject to the power than he would

Sale cannot
be made
reserving
minerals.

*Buckley v.
Howell.*

(*m*) Stat. 22 & 23 Vict. c. 35, s. 13. (*o*) 3 Bing. 207; 10 Barn. & Cress. 564; *ante*, p. 233.

(*n*) 29 Beav. 546.

(*p*) Page 552.

have had if the power had not been exercised. The mines are a part of the *corpus*, which the tenant for life being unimpeachable for waste is entitled to win and sell, and thus obtain the profits of; but the surface land being sold, the purchase-money is to be re-invested in land; and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates. It is clear that this could not be prevented; for the court could not refuse to allow the purchase-money to be invested in the purchase of an estate with minerals under it, if such a purchase were valuable and beneficial for the persons entitled; neither could it restrict the purchase to lands of which the mere value was agricultural, or, if not, prevent the tenant for life from working the mines. It is obvious that the court could not exact from the tenant for life any promise not to purchase any land of that description, nor, if exacted, enforce it. It is the same in this case as in that of timber; no promise or undertaking as to re-investment would be of any avail, nor could it be enforced by this court."

Stat. 25 & 26
Vict. c. 108.

In consequence of this decision an Act was passed of the 25 & 26 Vict. c. 108. This Act recites, that trustees and others in the intended exercise of trusts or powers authorizing them to dispose of land by sale, exchange, partition or enfranchisement, have disposed of land subject to such trusts or powers, with an exception or reservation of minerals, and either with or without rights and powers for or incidental to the working, getting and carrying away of such minerals, or otherwise relating thereto, or have so disposed of minerals, with or without such rights and powers, separately from the residue of the land, such mode of disposition not being expressly authorized nor forbidden by the instrument creating the trust or power.

And the statute goes on (q) to confirm all such sales, exchanges, partitions and enfranchisements, so far as they might have been invalid on the ground only, that the trust did not expressly authorize such exception or reservation. The Act further provides (r), that every trustee and other person, now or hereafter to become authorized to dispose of land by way of sale, exchange, partition or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land, with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of such minerals, or may, unless forbidden as aforesaid, dispose of, by way of sale, exchange or partition, the minerals, with or without such rights or powers, separately from the residue of the land; and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or, as the case may be, of the undisposed land; but this enactment shall not enable any such disposition to be made without the previous sanction of the Court of Chancery (now the Chancery Division of the High Court), to be obtained on petition, in a summary way, of the trustee or other person authorized as aforesaid; which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment, of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court. So that, in exercise of the power of sale, exchange, partition or enfranchisement, the land cannot be sold, exchanged, divided or enfranchised, without the minerals, nor the minerals without the land, except with the previous sanction of the Chancery Division of the High Court; but with such sanction any such sale, exchange, parti-

Confirmation
of previous
sales, &c.

Consent of
Chancery
Division
required.

(q) Stat. 25 & 26 Vict. c. 103, s. 1.

(r) Sect. 2.

tion or enfranchisement, may be made, unless it should be expressly forbidden by the instrument creating the power; and in that case the court has no authority to sanction the same.

Some very beneficial provisions respecting powers of sale and exchange contained in settlements are to be found in the Act which is commonly called Lord Cranworth's Act (s). The Act is intituled "An Act to give to trustees, mortgagees and others certain powers now commonly inserted in settlements, mortgages and wills." And it extends only, except where otherwise provided, to persons entitled or acting under a deed, will, codicil or other instrument, executed after the passing of the Act, or under a will or codicil confirmed or revived by a codicil executed after that date. The date of the Act is the 28th of August, 1860. In the first section it authorizes trustees, who have a power of sale, to exercise the same by selling the settled premises either together or in lots, and either by auction or private contract, and either at one time or at several times; and, in case the power shall expressly authorize an exchange, to exchange any hereditaments, which for the time being shall be subject to the uses or trusts, for any other hereditaments in England or Wales, or in Ireland as the case may be, and upon such exchange to give or receive any money for equality of exchange. It also provides (t), that any special or other stipulations, either as to title or evidence of title, or otherwise, may be inserted in any conditions of sale, or contract for sale or exchange; and it authorizes the vendors to buy in the hereditaments, or any part thereof, at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall

Lord Cranworth's Act.

Trustees with power of sale may sell in lots, &c.

Exchange.

Special conditions of sale.

Power to buy in, and rescind or vary contracts.

Power to resell.

(s) Stat. 23 & 24 Vict. c. 145, part 1. (t) Sect. 2.

be so rescinded, without being responsible for any loss which may be occasioned thereby. And it provides that no purchaser, under any such sale, shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money, in the purchase of any other hereditaments or otherwise. This last provision was inserted in consequence of its having been said, that trustees with a power of sale over settled lands, ought not to exercise their power merely with a view to a sale, unless they had in contemplation the purchase of other hereditaments with the sale money, to be settled to the same uses as the property sold. Whatever may be the duties of the trustees in this respect, the purchaser is by this clause exonerated from making any inquiries as to what the trustees intend to do with the purchase-money. The next section (*u*) provides, that for the purpose of completing any such sale or exchange, the persons empowered to sell or exchange shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise as may be necessary. This clause, therefore, renders unnecessary any express power to the trustees to revoke the old uses and appoint new ones, for the purpose of carrying into effect any sale or exchange under the power.

Reinvestment
of purchase-
money.

Persons em-
powered to
sell may
convey.

The next section (*x*) provides, that the money to be received upon any such sale, or for equality of exchange, shall be laid out in the manner indicated by the instrument containing the power of sale or exchange, or, if no such indication be therein contained as to all or any part of such money, then the same shall, with all convenient speed, be laid out in the purchase of other

Investment of
money re-
ceived on sale
or exchange.

Purchase of
other hereditaments.

To be settled
to same uses.

Settlement of
leaseholds or
copyholds
purchased.

Purchase
subject to
conditions.

No leasehold
less than
sixty years to
be purchased.

Discharge of
incum-
brances.

hereditaments in fee simple in possession, to be situate in England or Wales, or in Ireland as the case may be, or of lands of a leasehold or copyhold or customary tenure, which, in the opinion of the persons making the purchase, are convenient to be held therewith, or with any other hereditaments for the time being subject to the subsisting uses or trusts of the settlement. And all such hereditaments, so to be purchased or taken in exchange as aforesaid, as shall be freeholds of inheritance, are to be settled to the same uses as the hereditaments sold or given in exchange were, or would have been, subject to, or as near thereto as the deaths of parties and other intervening accidents will admit of; but not so as to increase or multiply charges (*y*). And all such hereditaments, so to be purchased or taken in exchange, as shall be of leasehold or copyhold or customary tenure, shall be settled and assured upon and for such trusts as shall, as nearly as may be, correspond with the uses of the settlement, but not so as to increase or multiply charges; and so that, if any of the hereditaments shall be held by lease for years, the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years (*z*). The same section (*a*) also provides, that any such purchase as aforesaid may be made subject to any special condition as to title or otherwise. Provided that no leasehold tenement shall be purchased, under the powers thereinbefore contained, which is held for a less period than sixty years. The next section (*b*) empowers the persons exercising the power, if they shall think fit, to apply any money to be received upon any sale, or for equality of exchange, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance, which shall or may affect all or any of the

(*y*) See *ante*, p. 222.

(*z*) *Ante*, pp. 223, 224.

(*a*) Stat. 23 & 24 Vict. c. 145, s. 4.

(*b*) Sect. 5.

hereditaments then subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were subject (c).

The Act provides (d) that no money arising from any sale or exchange of lands or hereditaments in England or Wales, is to be laid out in the purchase of hereditaments situate elsewhere than in England or Wales; and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales. And no money arising from any such sale or exchange of lands in Ireland, shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland; and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland. The Act further provides (e), that until the money to be received upon any sale, or for equality of exchange as aforesaid, shall be disposed of in the manner before mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made.

Where lands to be purchased or received in exchange must be situate.

Interim investment.

The Act provides (f) that it shall be lawful for any trustees of any leaseholds for lives or years, which are renewable from time to time, either under any covenants or contract, or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best en-

Renewal of renewable leaseholds.

(c) *Ante*, p. 321.

(d) Sect. 6.

(e) Sect. 7.

(f) Sect. 8.

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sale (*k*). And no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

The Act further provides (*l*) that no sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument; or, if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person, where it appears, from the will, deed, or other instrument, to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same, without the consent of any other person.

Consent
required.

The Act provides (*m*) that for the purposes of the Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

When estate
of person in
possession is
charged or
incumbered.

None of the powers or incidents conferred by the Act or annexed to particular offices, estates or circumstances, shall take effect or be exercisable, if it is declared in the

When powers
of Act not to
take effect.

(*k*) *Ante*, p. 331.
(*l*) Sect. 10.

(*m*) Sect. 31.

deavours to obtain from time to time a renewed lease of the same hereditaments, on the accustomed and reasonable terms (*g*), and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease, for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where, by the terms of the settlement or will, the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same.

Surrender of old leases.

Exception.

Payment for equality of exchange or renewal.

Power to raise money for equality of exchange or renewal by mortgage.

The Act further empowers (*h*) the persons effecting any such exchange or renewal as aforesaid to pay any money which shall be required for equality of exchange, or for renewal, out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange or comprised in the renewed lease, whether arising by any of the ways and means before mentioned, or otherwise, and notwithstanding the provisions for the application of money arising from sales and exchanges before contained (*i*). And if they shall not have in their hands sufficient money for the purposes aforesaid, they are empowered to raise the same by mortgage of the hereditaments to be received in exchange, or contained in the renewed lease, as the case may be, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease, as the case may be, shall be subject. And for the purpose of effecting such mortgage, such persons shall have the same powers of conveying or otherwise assuring as are contained in the Act with reference to a conveyance on

(*g*) See *ante*, pp. 223, 224.

(*i*) *Ante*, p. 331.

(*h*) Stat. 23 & 24 Vict. c. 145, s. 9.

sale (k). And no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

The Act further provides (l) that no sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument; or, if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person, where it appears, from the will, deed, or other instrument, to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same, without the consent of any other person.

Consent
required.

The Act provides (m) that for the purposes of the Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

When estate
of person in
possession is
charged or
incumbered.

None of the powers or incidents conferred by the Act or annexed to particular offices, estates or circumstances, shall take effect or be exercisable, if it is declared in the

When powers
of Act not to
take effect.

(k) *Ante*, p. 331.
(l) Sect. 10.

(m) Sect. 31.

Variations.	<p>deed, will or other instrument creating such offices, estates or circumstances, that they shall not take effect; and, where there is no such declaration, then, if any variations or limitations of any of the powers or incidents thereby conferred or annexed, are contained in such deed, will or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations (n). And nothing in the Act</p>
Saving rights of other persons.	<p>contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons, if the deed, will or other instrument under which such trustees or other persons are empowered to act, had contained express powers for such trustees or other persons so as to deal with or affect such estates or rights (o). It is not very easy to construe an express provision of any instrument as varied by another provision for the same purpose, contained in an Act of Parliament or in another instrument; and it seems desirable in practice either that the provisions of the Act which I have just referred to should be adopted altogether, or that they should be altogether excluded; but undoubtedly their adoption is a great saving of expense in the length of settlements or wills, in which the powers conferred by the Act may be desirable.</p>
Remarks on variations.	
Difference between powers and trusts for sale.	<p>Powers of sale differ from trusts for sale in this, that a trust for sale operates in equity as a conversion of the property subject to the trust into personal estate; and so long as the land subject to such a trust is unsold, it may, unless a sale be prevented by the united act of the beneficial owners, be properly sold by the trustee or trustees in whom it is vested. But powers of sale and exchange are incident only to the settlement which con-</p>

(n) Stat. 23 & 24 Vict. c. 145, s. 32. (o) Sect. 33.

tains them ; and when the settlement comes to an end, the powers of sale and exchange cease. It is sometimes a question whether the settlement has or has not come to an end. So long as any life estate created by the settlement is subsisting, so long no doubt the power may be exercised. But it has been held that the mere circumstances of the existence of a jointure, created by the settlement, was not such a continued subsistence of the settlement itself, as authorized the exercise of a power of sale contained in the settlement. This was decided in the case of *Wolley v. Jenkins* (*p*), affirmed on appeal by Lord Cranworth (*q*). It has, however, been held that, although the settlement may have come to an end as to certain undivided shares of the property, yet, if it subsists as to other undivided shares, the power of sale over the entirety may still be exercised. This was decided by the late Lord Romilly, Master of the Rolls, in the case of *Taite v. Swinstead* (*r*).

When the settlement has come to an end.

Existence of a jointure.

Wolley v. Jenkins.

Undivided shares.

Taite v. Swinstead.

(*p*) 23 Beav. 53.

(*r*) 23 Beav. 526.

(*q*) 3 Jurist, N. S. 321.

LECTURE XXIII.

I HAVE already noticed the provisions of the Settled Estates Act, 1877 (*a*), with reference to the sale of timber on a settled estate (*b*). I have also referred to the provisions of the Act which confer a power of leasing at rack rent on every tenant for life under a settlement made after the 1st of November, 1856,—the time when the now repealed Act to facilitate leases and sales of settled estates (*c*) came into operation (*d*). Before the passing of the Act to facilitate leases and sales of settled estates, whenever a settlement contained no powers of leasing or sale, or powers which were inadequate for such leases or sales as circumstances rendered desirable, recourse was obliged to be had to the expensive machinery of a private Act of Parliament, for the purpose of conferring the desired powers. The Act of 1856 enabled the Court of Chancery, on the application of the parties interested, to confer powers both of leasing and sale. It was, as we have already seen (*e*), several times amended. And the Act with its amendments has now given place to the Settled Estates Act, 1877 (*f*), the provisions of which I now intend to bring under your notice.

The Settled
Estates Act,
1877.

Interpreta-
tion of
"settlement"
and "settled
estates."

The word "settlement" as used in the Act signifies any instrument or instruments under or by virtue of which any hereditaments of any tenure, or any estates or interests in any such hereditaments, stand limited to or in trust for any persons by way of succession, in-

(*a*) Stat. 40 & 41 Vict. c. 18.

(*b*) *Ante*, pp. 230, 231.

(*c*) Stat. 19 & 20 Vict. c. 120.

(*d*) *Ante*, pp. 304, 305.

(*e*) *Ante*, p. 304.

(*f*) Stat. 40 & 41 Vict. c. 18.

cluding any such instruments affecting the estates of any one or more of such persons exclusively. And the term "settled estates," as used in the Act, is to signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement. And for the purposes of the Act a tenant in tail after possibility of issue extinct (*g*), shall be deemed to be a tenant for life. And all estates or interests in remainder or reversion not disposed of by the settlement (*h*), and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement. And in determining what are settled estates within the meaning of the Act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement, at the time of the said settlement taking effect (*i*). The court means the High Court of Justice, and all causes and matters under the Act are referred to the Chancery Division of the Court (*k*). The Court.

The Act (*l*) empowers the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed: Power to authorize leases of settled estates.

First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding, for an agricultural or occupation lease, so far as relates Terms to be granted.

(*g*) See Lectures on the Seisin of the Freehold, pp. 159, 162.

(*h*) *Ante*, pp. 17, 19.

(*i*) Stat. 40 & 41 Vict. c. 18, s. 2.

(*k*) Sect. 3.

(*l*) Sect. 4.

to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water-mills, way-leaves, water-leaves, or other rights or easements, forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: provided always that any such lease (except an agricultural lease) may be for such term of years as the court shall direct, where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term before specified.

Rent to be reserved.

Secondly, on every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine: provided always that in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent, or any smaller rent than the rent to be ultimately made payable, may, if the court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease.

Mining lease, investment of a portion of the rent.

Thirdly, where the lease is of any earth, coal, stone or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as after mentioned; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who, by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof. And in every such lease sufficient provision shall be made to insure such application of the aforesaid portion of the rent, by the appointment of trustees, or otherwise as the court shall deem expedient.

When tenant for life entitled to work
— 'tues.

If the earth, coal, stone or mineral has already been worked, then the tenant for life by reason of his estate

is entitled to work the same whether he be tenant for life without impeachment of waste or not (*m*). And if he be tenant for life without impeachment of waste, then he is, by virtue of the declaration to that effect contained in the settlement, entitled to work the same, whether they have been already worked or not. In either of these cases, therefore, only one fourth of the rent or payment reserved need be put by. But if the earth, coal, stone, or mineral has not been already worked, and the tenant for life is not without impeachment of waste, then three fourths of the rent or payment reserved must be put by; for he is not in this case entitled to work the same for his own benefit.

Fourthly, no such lease shall authorize the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease. This is in accordance with the common law, which prohibits a tenant, not unimpeachable of waste, from felling timber for the purpose of using the same for the purposes of a mine comprised in his lease (*n*). Felling of trees.

Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof; and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

Subject and in addition to the conditions before mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient, with reference to the special circumstances of the demise (*o*). Special covenants. The power to authorize leases conferred

(*m*) *Ante*, p. 237.

(*o*) Stat. 40 & 41 Vict. c. 18,

(*n*) *Lord Darcy v. Askwith*,
Hobart, 234. s. 5.

Part of settled estates may be leased.
Surrender of leases.

Preliminary contracts.

Licences to lease copyholds.

by the Act extends to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time (*p*). The Act provides (*q*) that any leases, whether granted in pursuance of the Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not; and the power to authorize leases conferred by the Act extends to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease. The Act authorizes preliminary contracts to grant any leases authorized by the Act; and any of the terms of such contracts may be varied in the leases (*r*). The Act also provides (*s*) that all the powers to authorize and to grant leases contained in the Act shall be deemed to include respectively powers to authorize the lords of settled manors, and powers to the lords of settled manors, to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors, to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under the Act. You may remember that I explained in a former Lecture (*t*) that a lease of a copyhold granted by licence of the lord of the manor takes effect out of the estate of the lord; whereas a grant of copyhold lands by the lord in pursuance of a custom for that purpose takes effect by virtue of the custom, irrespectively of the estate of the lord. So that, in the absence of any express power for the purpose, the lord of a manor, who is tenant for life only, cannot grant to any copyhold or customary tenant of the manor a licence to grant a lease of his tenement to endure longer than the life of the lord. This enactment now enables the court to authorize the lord of a settled manor to

(*p*) Stat. 40 & 41 Vict. c. 18,

(*r*) Sect. 9.

s. 6.

(*t*) Lectures on the Seisin of the Freehold, pp. 40, 41; *ante*,

(*q*) Sect. 7.

p. 315.

(*r*) Sect. 8. See *ante*, p. 314.

grant to the tenants valid licences to demise for the whole terms of years authorized by the Acts.

The powers conferred by the Act may be exercised by the court either by approving of particular leases or by ordering that powers of leasing in conformity with the provisions of the Act shall be vested in trustees as after mentioned (u). The applicant must in all cases produce such evidence as the court shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized (x). When a particular lease or contract for a lease has been approved by the court, the court is to direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were, at the time of the execution thereof, absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate, if necessary, by way of revocation and appointment of the use or otherwise as the court shall direct (y).

How powers exercised.

Evidence to be produced.

Court to direct who shall be lessor.

Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to the Act should be vested in trustees, it may, by order, vest any such power accordingly, either in the existing trustees of the settlement, or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise as the court shall direct; and in every such case the

Powers of leasing may be vested in trustees.

(u) Sect. 10.

(y) Sect. 12; *ante*, p. 307.

(x) Sect. 11.

Leases need
not be settled
by the court.

Conditions
where in-
serted may
be struck out.

court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power; and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time, for the purpose of exercising such powers of leasing as aforesaid. In carrying out the provisions of the corresponding section of the Act to facilitate leases and sales of settled estates (z), the court had been in the habit of requiring that leases granted in pursuance of a power, vested in any trustees or other persons under the provisions of that section, should be settled by the court or by a judge thereof, or otherwise should be made conformable with a model lease deposited in the chambers of the judge. The introduction of this condition having been found to occasion delay and expense, an amending Act was passed (a), which is now embodied in the fourteenth and fifteenth sections of the Settled Estates Act, 1877 (b), namely, that in orders under the Act for vesting any powers of leasing in any trustees or other persons, no condition shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the said court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers; save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court that there is some special reason rendering the insertion of such a condition necessary or expedient. Provided also (c), that in all cases of orders (whether under the Act or under the corresponding enactment of the repealed Acts), in which any such condition as last aforesaid shall have been inserted, it shall be lawful for

(z) Stat. 19 & 20 Vict. c. 120,
s. 10.

(a) Stat. 27 & 28 Vict. c. 45,
s. 1.

(b) Stat. 40 & 41 Vict. c. 18,
ss. 14, 15.

(c) Sect. 15.

any party interested to apply to the court to alter and amend such order, by striking out such condition ; and the court shall have full power to alter the same accordingly ; and the order so altered shall have the same validity as if it had originally been made in its altered state ; but nothing therein contained shall make it obligatory on the court to act under this provision, in any case in which, from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why, in the case in question, such a condition is necessary or expedient.

So much then for the power of granting leases under the Settled Estates Act, 1877. The Act also provides for the sale of settled estates. By the 16th section it is enacted, that it shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates ; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court. When any land is sold for building purposes, it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve (*d*).

Sale of settled estates.

Consideration for land sold for building may be a fee farm rent.

And on any sale of land, any earth, coal, stone or mineral may be excepted ; and any rights or privileges

Minerals, &c., may be excepted.

may be reserved ; and the purchaser may be required to enter into any covenant or submit to any restrictions which the court may deem advisable (e).

Dedication
for streets,
roads, and
other works.

The court is empowered if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains or watercourses, either to be dedicated to the public or not ; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to and vested in any other trustees, upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable (f). Difficulties arose in the exercise of the power contained in the corresponding section of the Act to facilitate leases and sales of settled estates (g) for want of sufficient provision for the expense of making the streets and other works authorized to be made and executed. And in April, 1876, the point came before the present Master of the Rolls in the case of *In re Venour's Settled Estates* (h). It was there decided that the court had no power under the then existing Acts for the leases and sales of settled estates to charge, mortgage or sell part of a settled estate, in order to raise money for making roads and sewers on building land forming other part of the estate, and that it had no power to apply for that purpose money which was liable to be laid out in the purchase of lands to be settled to the same uses as the settled

*Re Venour's
Settled Estates.*

(e) Sect. 19; see *ante*, pp. 327
—330.

(f) Sect. 20.

(g) Sect. 19 & 20 Vict. c. 120,
s. 14.

(h) L. R., 2 Ch. D. 522.

estate. This decision appears to have drawn the attention of the legislature to the subject, and accordingly an act was passed to amend the law (*i*), which is now embodied in the 21st section of the Settled Estates Act, 1877, which provides (*k*) that where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses, including all necessary or proper fences, pavings, connections and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out, and making and execution, be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulation of rents, profits or income; and the court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses or other works, out of any such rents, profits, income or accumulations, during such period or periods of time as to the court shall seem advisable.

Provision for expenses of streets, roads and other works.

Repairs of streets, roads and other works.

By the 22nd section, it is provided that on every sale or dedication to be effected as hereinbefore mentioned, the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such

Court may direct who shall execute conveyance.

(*i*) Stat. 39 & 40 Vict. c. 30, s. 1.

(*k*) Stat. 40 & 41 Vict. c. 18, s. 21.

person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct.

Notice of the exercise of powers to be given as directed by the court.

Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

Many of the following sections refer to the mode in which the petition is to be presented, and to the formalities to be gone through in making an application to the court. These provisions seem to me to belong, less to the department of real property, than to that of the practice of the Chancery Division of the High Court. I shall therefore do no more than simply confine myself to this reference to them (*l*). The court is to direct that some sufficient notice of any exercise of any of the powers conferred on it by the Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient for preventing fraud or mistake (*m*). All money to be received on any sale effected under the authority of the Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into court ex parte the applicant in the matter of the Act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the Accountant-General ex parte the applicant in the matter of the Act; and such money shall be applied as the court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates

(*l*) Stat. 40 & 41 Vict. c. 18, (*m*) Sect. 33.
ss. 23—32, 41—45, 49—52.

to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (n).

The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land, if the money had been invested in the purchase of land (o). Until the money can be applied as aforesaid, the same shall be invested as the court shall direct in some or one of the investments in which cash under the control of the court is for the time being authorized to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land, if the money had been invested in the purchase of land (p).

Trustees may apply moneys in certain cases without application to court.

Until money can be applied to be invested, and dividends to be paid to parties entitled.

Where any purchase money paid into court under the provisions of the Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the

Court may direct application of money in respect of leases or reversions as may appear just.

(n) Sect. 34.

(o) Sect. 35.

(p) Sect. 36.

LECTURE XXIV.

Infants.

Stat. 18 & 19
Vict. c. 43.

Infants, with
approbation
of court, may
make valid
settlements
on marriage.

WE now come to the consideration of settlements by infants and voluntary settlements. An infant or person under the age of twenty-one years cannot generally make any conveyance of land so as absolutely to bind himself. A conveyance made by a person during minority is voidable by him when he comes of age. This was found to be a great inconvenience on the marriage of infants, whether male or female, entitled to landed property; and, accordingly, an Act was passed "to enable infants, with the approbation of the Court of Chancery, to make binding settlements of their real and personal estate on marriage" (a). This Act recites that great inconveniences and disadvantages arose in consequence of persons who marry during minority being incapable of making binding settlements of their property. And it enacts (b) that from and after the passing of the Act, it shall be lawful for every infant, upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery (now the Chancery Division of the High Court), to make a valid and binding settlement, or contract for a settlement, of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy. And every conveyance, appointment and assignment of such real or personal estate, or contract to make a conveyance, appointment or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of

(a) Stat. 18 & 19 Vict. c. 43.

(b) Sect. 1.

giving effect to such settlement, shall be valid and effectual, as if the person executing the same were of the full age of twenty-one years. Provided always, Proviso. that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant. Provided always (c), that in case any appointment under a power of appointment, or any disentailing assurance shall have been executed by any infant *tenant in tail* under the provisions of the Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void. In case infant die under age. The sanction of the court to any such settlement, or contract for a settlement, may be given upon petition, presented by the infant, or his or her guardian, in a summary way, without the institution of a suit; and if there be no guardian, the court may require a guardian to be appointed or not as it shall think fit; and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition (d). But nothing in the Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (e). Sanction of court to be given on petition. Not to apply to males under twenty or females under seventeen.

There is evidently an error in the second section of the Act, which speaks of an appointment under a power of appointment having been executed by an infant *tenant in tail* under the provisions of the Act. The words *tenant in tail* are evidently applicable to a disentailing assurance, which had just been spoken of, but are inapplicable to an appointment under a power of appointment. I apprehend, however, that so obvious an error would not prevent an appointment made by an infant, under a power of appointment pursuant to the

(c) Sect. 2.
W.S.

(d) Sect. 3.

(e) Sect. 4.
A A

Error in second section.

Act, from becoming void, if the infant should afterwards die under age.

Voluntary
settlements.

Stat. 27 Eliz.
c. 4.
Recital.

Enactment as
to fraudulent
conveyances.

We now come to the consideration of voluntary settlements. The law with respect to settlements made otherwise than for valuable consideration is very curious, and it now practically enables any person, who has made a voluntary settlement of his lands, to defeat that settlement by afterwards mortgaging or selling the estate. In the reign of Queen Elizabeth two Acts were passed, statute 13 Eliz. c. 5, intituled "An Act against fraudulent deeds, gifts, alienations, &c.," and stat. 27 Eliz. c. 4, intituled "An Act against covinous and fraudulent conveyances." I propose first to notice the statute 27 Eliz. c. 4. This statute recites in effect that not only the Queen but also divers of her highness's good and loving subjects and bodies politick and corporate, after conveyances obtained and purchases made by them of lands and hereditaments for money or other good consideration, may incur great loss, by reason of fraudulent and covinous grants and conveyances made of lands, tenements or hereditaments so purchased, which grants and conveyances were meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else, by the secret intent of the parties, the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences, as though the same were made *bonâ fide* for good causes and upon just and lawful considerations. For remedy whereof it is enacted (*f*), to the effect that every conveyance of lands or hereditaments, for the intent and of purpose to defraud and deceive such persons, bodies

politick or corporate, as have purchased or shall afterwards purchase the same lands and hereditaments, so formerly conveyed or granted, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, shall be deemed or taken (only as against that person or persons, bodies politick and corporate, and all persons claiming under them, which have purchased, or shall hereafter so purchase, *for money or other good consideration*, the same lands, tenements or hereditaments, or any rent, profit or commodity out of the same) to be utterly void and of non effect, any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding. But (g) the Act is not to extend to make void any conveyance made upon or for good consideration and *bond fide*. The Act also provides (h), that if any person shall make any conveyance of lands or hereditaments, with any clause or condition of revocation or alteration, at his or their will or pleasure, of such conveyance or limitation to uses or estates out of the same lands or hereditaments, or any part of them, contained in any writing, deed or indenture of assurance; and, after such conveyance so made, shall grant, convey or charge the same, or any part thereof, to any persons or bodies politick and corporate, *for money or other good consideration to be paid or given*, the said first conveyance not having been revoked, made void or altered, according to the power reserved or expressed in the said secret conveyance, then the former conveyance, as touching the lands and hereditaments so sold, conveyed or charged against the bargainees, vendees, lessees, grantees, and all claiming under them, shall be deemed and taken to be void and of none effect. But (i) no lawful mortgage made or to be made *bond fide*, and without fraud and covin, upon

Exception.

Conveyances with power of revocation.

Exception of mortgages.

good consideration, is to be impeached or impaired by force of the Act.

Extends to copyholds and leaseholds.

Lessee.

Mortgagee.

"Good" means "valuable" consideration.

Act avoids voluntary settlements as against subsequent purchaser, though with notice.

Settlement must be voluntary.

This Act extends to copyhold and leasehold as well as to freehold lands; and a lessee of lands, who pays either a premium or a rent of adequate amount, and also a mortgagee of lands, to the extent of his mortgage, is a purchaser for good consideration within the meaning of the statute. The "good consideration" mentioned in this statute has been held to mean *valuable consideration*; not necessarily a money consideration; for a settlement made on marriage is a settlement for valuable consideration (*k*). But if there be no consideration whatever beyond that of natural love and affection, as that of a father to his children, the settlement is not protected by the fourth section, which I have just quoted. One would have thought, on the construction of the statute, that it was pointed only to deeds made with a deliberate intention of deceiving subsequent purchasers. But a much wider interpretation has been placed upon the Act. And it has been held to render void all settlements, other than those made for valuable consideration, as against any person to whom the settled lands may have been afterwards mortgaged or sold by the settlor for money or other valuable consideration, even although the mortgagee or purchaser may have had full knowledge of the voluntary settlement. This seems strange doctrine, but it is the law of England. The settlement must, however, be voluntary. And on this subject I may refer you to two cases of *Toker v. Toker* (*l*), and *Townend v. Toker* (*m*). In these cases a lady, Miss Margaret Grace Toker, was entitled in fee to a landed estate, subject to mortgages; and she proposed to her nephew,

(*k*) See Principles of the Law of Personal Property, pp. 84, 85, 10th ed.

(*l*) 31 Beav. 629; 3 De Gex, Jones & Smith, 487.

(*m*) L. R., 1 Ch. 446.

Philip Champion Toker, that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this, provided she would settle the estate so as to limit it to him absolutely after her death. She agreed to this; and a settlement was accordingly executed, by which, in consideration of her natural love and affection for him, and of his covenant next mentioned, the estate was limited to him in fee after his aunt's decease; and he covenanted to indemnify her from all liability in respect of the mortgages, except the payment of the interest during her life. He removed to a larger house at considerable expense, and they lived together for some time. The aunt afterwards ceased to live with her nephew; and her love and affection for him having cooled, she endeavoured to set aside the settlement that had been made. And the first step that she took for that purpose was to file a bill in Chancery against her nephew, for the purpose of upsetting the settlement. This she did in the Rolls Court (*n*). But her bill was dismissed. It appeared that the deed had been prepared on her own instructions by the family solicitor, that it had been fully explained to her, and that her nephew had possessed no further influence than that arising from his aunt's attachment for and confidence in him. And this decision was affirmed by the Court of Appeal (*o*).

*Toker v.
Toker.*

These decisions are in accordance with the established rules on this subject. A person who, with his eyes open, makes a voluntary settlement of his lands, without any undue influence being brought to bear upon him, and without any fraud or misrepresentation having been practised upon him, is bound by his own deed, and

(*n*) *Toker v. Toker*, 31 Beav. 629.

(*o*) *Toker v. Toker*, 3 De Gex, Jones & Smith, 487.

Insertion of
power of re-
vocation in a
voluntary
settlement.

cannot afterwards directly set it aside. It is the duty of any solicitor or counsel, employed to prepare or settle a voluntary settlement, to suggest to the settlor the propriety of inserting a power of revocation; so that, if he should afterwards change his mind, he may be able to revoke the settlement by means of the power. But the insertion of such a power is not absolutely necessary to the validity of a voluntary settlement, if the settlor knows what he is about, and makes the settlement entirely of his own free will (*p*).

Townend v.
Toker.

Margaret Grace Toker, being thus foiled in her endeavour to set aside the settlement, sold the property in question to a Mr. Townend, who had notice of the settlement; and Mr. Townend filed a bill against her and Philip Champion Toker, the nephew, claiming specific performance of the agreement which she had entered into with him for the sale to him of the property. Thus arose the case of *Townend v. Toker* (*q*); and the question then occurred, whether the settlement in question was or was not a voluntary settlement. It was admitted that, if the settlement was a voluntary settlement, Margaret Grace Toker had a perfect right to sell the property to Mr. Townend, and that, under the statute of 27 Eliz. c. 4, the settlement would be void as against him. But it was contended that the settlement was not a voluntary settlement. And the Court of Appeal, having regard to the whole of the transaction, came to the conclusion that the settlement was not a voluntary settlement, but that it was made for valuable consideration. The court held that the expense which the nephew had been at in moving to a larger house constituted, under the circumstances, a sufficient consideration to make the settlement valuable. The court also relied on the covenant on the part of

(*p*) *Phillips v. Mullings*, L. R., 8 Ch. 430.
7 Ch. 244; *Hall v. Hall*, L. R., (*q*) L. R., 1 Ch. 446.

P. C. Toker, contained in the settlement, to pay the mortgages charged on the property, except the interest of them during the life of Margaret Grace Toker. The settlement, it is true, purported to be made in consideration not only of these covenants, but also of natural love and affection. But the court on the whole considered it to be made for good and valuable consideration, and *bonâ fide* within the exception contained in the 4th section of the statute of Elizabeth. The court also expressed an opinion that, had the settlement been voluntary, and so void as against the purchaser, the nephew could not have established any claim to any portion of the purchase-money. And this point had been previously so decided by Lord Romilly, M. R., in the case of *Daking v. Whimper* (r). The Court of Appeal, by this decision, reversed a decree which had been made by Lord Romilly in favour of Townend, the purchaser, his lordship having treated the settlement as merely voluntary.

*Daking v.
Whimper.*

This case shows how careful any purchaser or mortgagee should be in completing a purchase or mortgage, when he has notice of a previous settlement, which may appear or be alleged to be merely voluntary. Extraneous circumstances, of which he may not be aware, may cause the settlement to be considered as a settlement for valuable consideration, and so valid as against him. But, if the settlement be purely voluntary it will, by virtue of the above statute of Elizabeth, be absolutely void as against a subsequent purchaser or mortgagee for valuable consideration. On the point as to what is and what is not a valuable consideration within the meaning of the statute, I venture to quote the following concise and accurate statement of the law contained in the Treatise on Vendors and Purchasers of my friend

Caution to
purchasers.

What is a
valuable con-
sideration.

Mr. Dart's
statement of
the law.

Mr. Dart (s). "It is settled that a mere voluntary conveyance (unless, perhaps, it be in favour of a charity) is fraudulent within the meaning of the statute, even although made by the direction of the court; *e. g.*, a conveyance in trust to sell, and to pay creditors who are not parties to the arrangement; or a post-nuptial settlement upon the settlor's wife, husband, or family, unless made in pursuance of a binding ante-nuptial agreement, or of a further portion, or of an agreement to pay a further portion, which is afterwards paid, or (on a settlement of the husband's estate) of the wife relinquishing her interests under an existing settlement, or her jointure or dower (if married before the late Act came into operation); or mortgaging her separate estate, or property over which she has a joint power of appointment, to pay his debts; or (on a settlement of the wife's estate) of the husband's relinquishing his estate *in jure mariti*; so, if a stranger concur and provide for payment of the settlor's debts, he will be considered to have purchased the benefit of the settlement for the settlor's family; and in separation deeds the covenant usually entered into by the trustees to indemnify the husband against her debts, will as against creditors, and also, it is conceived, as against subsequent purchasers, support any further settlement he may make upon her."

Settlement
partly volun-
tary.

A settlement may be made partly for good and valuable consideration, and partly without the good consideration mentioned in the above statute. This not unfrequently happens in the case of marriage settlements. The husband and the wife, and the issue of the marriage, are all within the marriage consideration; and, so far as any estates or interests are limited to them, so far is the settlement made for good consideration within the above statute. But, if the settle-

(s) Dart's Vendors and Purchasers, vol. 2, p. 813, 4th ed.; vol. 2, p. 889, 5th ed.

ment goes on, as it frequently does, to limit estates, in default of issue of the marriage, to the brothers and sisters, or other collateral relations of the settlor, these limitations, unless they have been made the subject of bargain on the occasion of the marriage, are obviously of a purely voluntary kind; and, so far as these limitations are concerned, the settlement is voluntary. If the limitations beyond the issue of the marriage are in favour of the collateral relations or connections, not of the settlor, but of the other party, viz. of the wife, if the husband be the settlor, or of the husband, if the wife be the settlor, the presumption seems to be that such limitations must have been the result of contract, and so *prima facie* are not voluntary. The case of *Wollaston v. Tribe*, before Lord Romilly, M. R. (t), is a good example of a settlement made on marriage, which was held to be partly voluntary and partly for valuable consideration. In that case the ultimate limitation of a lady's property contained in a settlement made on her marriage was, in default of her own issue, in favour of her nephews and nieces. This was held to be a purely voluntary limitation. The lady was forty-one at the time of her marriage, and as the solicitor who prepared the settlement did not, as he admitted, explain to her the position in which she would be placed by the settlement in the event of her surviving her husband and having no issue, the ultimate limitation in favour of her nephews and nieces was set aside on a bill filed by her.

Collaterals.

Wollaston v. Tribe.

The fifth section of the statute 27 Eliz. c. 4, places a settlement, with a power of revocation reserved to the settlor, on the same footing as a purely voluntary settlement. If persons should give a valuable consideration for property, and at the same time enable the settlor to deprive them of it at his own pleasure, it is their own fault.

Settlement with power of revocation.

(t) L. R., 9 Eq. 44.

Sale by
volunteer.

Where a voluntary settlement is made in favour of a person, who afterwards disposes of the estate or interest settled upon him, to a purchaser for valuable consideration, it is impossible for the settlor, who has made such voluntary settlement, to sell or mortgage the property, which the volunteer from him has parted with for valuable consideration, in such a manner as to prejudice or affect the person, to whom the volunteer has so conveyed the estate for valuable consideration.

Stat. 13 Eliz.
c. 5. Con-
veyances in
fraud of cre-
ditors void as
against them.

The Act of 13 Eliz. c. 5, in effect enacts that all gifts and conveyances of lands and tenements, goods and chattels, or any lease, rent, common or other profit or charge out of the same, by writing or otherwise to or for any intent or purpose to delay, hinder or defraud creditors and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, shall be from thenceforth deemed and taken (only as against the persons whose actions, suits, debts, accounts, damages, penalties and so on, by such guileful, covinous or fraudulent devices and practices as aforesaid, are, shall or might be in anywise disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of none effect, any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. But it provides (*u*) that nothing in the Act contained shall extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance to them made any notice or knowledge of such covin, fraud or collu-

Protection to
purchasers
without
notice.

(*u*) Sect. 6.

sion as aforesaid. This statute extends to all property which is capable of being taken in execution. The result of this statute is that if any person is indebted to the extent of insolvency, any voluntary settlement, which he may make when he is so indebted, is void as against his creditors. And if he is not indebted to the extent of insolvency, yet if the effect of the voluntary settlement is to defeat or delay present creditors, it will be equally void as against them. And a voluntary settlement will be void, not only as against the creditors of the settlor at the time of making the settlement, but also as against his future creditors; provided that, at the time of the making the settlement, he was indebted to the extent of insolvency, or it can be shown that the settlement was made with intent to delay or defraud creditors.

Effect of stat.
13 Eliz. c. 5.

Future creditors.

The provisions of this statute have now been supplemented, so far as persons in trade are concerned, by a clause in the last Bankruptcy Act, 1869 (*x*). This Act provides (*y*) that any settlement of property made by a trader (not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement, made on or for the wife or children of the settlor; of property which has accrued to the settlor after marriage in right of his wife), shall, if the settlor becomes bankrupt *within two years* after the date of such settlement, be void as against the trustee of the bankrupt appointed under that Act, and shall, if the settlor becomes bankrupt at any subsequent time *within ten years* after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void as

Avoidance of
voluntary
settlements on
bankruptcy.

(*x*) Stat. 32 & 33 Vict. c. 71, s. 91.

(*y*) Sect. 91.

Covenant to settle future property.

against such trustee. And any covenant or contract, made by a trader in consideration of marriage, for the future settlement, upon or for his wife or children, of any money or property, wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under the Act. The word "settlement," for the purpose of this section, includes any conveyance or transfer of property.

Remarks on sect. 91 of the Bankruptcy Act, 1869.

This section, you will perceive, only applies to traders, and it is more stringent than the statute of 13 Eliz. c. 5. For, although the settlor may not be indebted at the time of the settlement, yet, if he becomes bankrupt within two years from the date of the settlement, a voluntary settlement made by him is void as against his creditors. And if he becomes bankrupt even within ten years from the date of the settlement, the onus is thrown upon those claiming under the settlement, to prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement. If the volunteer, on whom the property has been thus settled, should afterwards alienate such property for valuable consideration by way of mortgage or sale, I presume that, by analogy to the decisions under the statute of 13 Eliz. c. 5, the mortgagee or purchaser from such volunteer would be safe against the creditors of the settlor. The latter clause of the 91st section deals with contracts made by a trader in consideration of marriage, which contracts of course are for valuable consideration. And, where any such contract is for the future settlement of the trader's property, not being property of or

in right of his wife, the contract is void as against the creditors, if he becomes bankrupt before such property has been actually transferred or paid pursuant to the contract.

With regard to voluntary covenants entered into by persons to settle property, as, for instance, a voluntary covenant to surrender copyholds, equity will not enforce the specific performance of a merely voluntary covenant, even although it should be in favour of the wife or children of the covenantor. This was decided in the case of *Jefferys v. Jefferys* (z). In that case a father by a voluntary settlement conveyed certain freehold property, in consideration of his natural love and affection for his three daughters, to trustees, upon trust out of the rents to pay to himself an annuity of 80% for his life, and after his death, to sell the property, and, after paying certain incumbrances, to stand possessed of the residue of the money upon certain trusts for the benefit of his three daughters. He also covenanted to surrender copyhold lands to the same trustees upon the same trusts; but he made no surrender of the copyholds in pursuance of his covenant. He then died, having made a will, by which he gave part of the before-mentioned freehold and copyhold estates to his wife Isabella, who was shortly after his death admitted to part of his copyhold estates. After his death a bill was filed by two of the daughters against the widow and the trustees of the settlement, praying that the widow might be decreed to surrender the copyholds to which she had been admitted to the trustees as trustees of that deed. A decree was made for carrying into effect the trusts of the settlement, so far as they related to the freeholds, the plaintiffs' title to them being complete. But, with respect to the copyholds, as the plaintiffs

Voluntary
covenants not
enforced.

*Jefferys v.
Jefferys.*

(z) Craig & Phillips, 138.

were merely volunteers, who had nothing but a covenant, which covenant had never been carried into effect by an actual surrender, the bill against the widow was dismissed with costs. This and other cases have overruled the decision of Lord St. Leonards, when Lord Chancellor of Ireland, in the case of *Ellis v. Nimmo* (a).

Ellis v. Nimmo overruled.

Declaration of trust enforced.

Distinction between voluntary covenant and voluntary declaration of trust.

If, however, in addition to the covenant to surrender the copyholds, the deed had contained a declaration, that in the meantime and until the surrender should be made, the covenantor should stand seised of the copyhold premises in trust for the covenantees, their heirs and assigns, in that case equity would have fastened on the declaration of trust, and enforced the trusts as against the covenantor. The distinction is perhaps somewhat refined, but is still clear, between a voluntary covenant to settle property on other persons, and a declaration by a person entitled to property, that from henceforth he will hold that property merely as a trustee for some other persons. The latter will be enforced, the former will not. But as regards purchasers and mortgagees, a voluntary declaration of trust of course stands on no better footing than a voluntary conveyance.

(a) Lloyd & Gould's Cases *tempore* Sugden, p. 333.

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